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IN THE

Supreme Court of the United States

October Term, 1985

LONE PINE STEERING COMMITTEE, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether United States District Courts have subject matter jurisdiction under section 113 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 42 U.S.C. §9613, over claims brought by private responsible parties, challenging final decisions by the Environmental Protection Agency, to undertake non-emergency remedial action to clean up hazardous waste sites under section 104 of CERCLA, 42 U.S.C. §9604?

2. Whether, in actions brought by the United States under section 107 of CERCLA, 42 U.S.C. §9607, seeking reimbursement for expenses incurred in the clean up of hazardous waste sites, a private party may raise defenses based upon EPA's failure to comply with section 104 of CERCLA, 42 U.S.C. §9604?

LIST OF PARTIES

The following parties appeared before the United States Court of Appeals for the Third Circuit in this matter: Lone Pine Steering Committee, Carter-Wallace, Inc., The Coca-Cola Company, Millipore Corporation, Minnesota Mining & Manufacturing Company, The Nestle Company, Owens-Illinois, Inc. and the United States Environmental Protection Agency.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Lone Pine Steering Committee, *et al.*, who appeared as plaintiffs and appellants below, petition this Court for a writ of certiorari to review a judgment and decision entered by the United States Court of Appeals for the Third Circuit on November 22, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, as amended, is reported at 777 F.2d 882, and appears in Appendix A at 1a and Appendix B at 13a. The judgment of the Court of Appeals, dated November 22, 1985, appears in Appendix E at 43a. The opinion of the United States District Court for the District of New Jersey is reported at 600 F. Supp. 1487, and appears in Appendix C at 15a.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 22, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 104, 105, 107(a) and (b), and 113(d) and (e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § § 9604, 9605, 9607, and 9613, appear in Appendix G at 45a.

STATEMENT OF THE CASE

This case was originally brought by petitioners,[1] seeking injunctive and declaratory relief, to resolve important and far-reaching questions concerning the proper exercise by the Environmental Protection Agency (EPA) of its authority under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or the Act), 42 U.S.C. § § 9601 *et seq.*, to clean up inactive hazardous waste sites involving no imminent threat to the public health, or to the quality of the environment. The central issue posed by this case is whether, in such non-emergency situations, parties from whom EPA will ultimately seek over $17 million in reimbursement for clean up expenses, may be denied the opportunity to be heard in opposition to EPA's final decision to undertake those efforts, before federal funds are irrevocably committed.

A. Statutory Background

CERCLA created a $1.6 billion Hazardous Substance Response Trust Fund (Superfund) for use in both emergencies

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[1] In addition to the Lone Pine Steering Committee , the petitioners are Carter-Wallace, Inc.; The Coca-Cola Company; Minnesota Mining & Manufacturing Co., The Nestle Company; and Owens-Illinois, Inc.

and long-term remedial actions at hazardous waste sites.[2] Section 104 of CERCLA, 42 U.S.C. §9604, authorizes EPA to use the Superfund to clean up hazardous waste sites. If EPA uses the Superfund to remove hazardous wastes at a particular site, it may seek compensation from the class of defendants established by the Act, who are strictly liable to reimburse EPA unless they can establish that the release or threatened release of hazardous substances was caused by an act of God, war, or certain actions of third parties. 42 U.S.C. §9607.

One premise of this program is that the potential problem posed by hazardous waste sites throughout the United States is so vast that even $1.6 billion may not be adequate to fund a solution. Accordingly, EPA's authority to use the Superfund is subject to two important limitations. First, Superfund resources may not be used if EPA determines that proper clean up will be undertaken by the responsible private parties. 42 U.S.C. §9604(a) (1).[3] Second, both government and private response actions must be consistent with the standards established by the National Contingency Plan (NCP), which requires remedial action to be cost effective while protecting public health and the environment. 42 U.S.C. §9605; 40 C.F.R. §300.68(j) (1985).

To implement the statutory policy favoring private clean up efforts, EPA has developed procedures to identify potentially responsible private parties (PRPs) willing to clean up sites, and to issue notice letters to those parties providing relevant information and an opportunity to undertake private response action. *See* EPA Procedures for Issuing Notice Letters (Oct. 12, 1984). For sites where no emergency exists, the NCP also envisions that EPA will conduct a remedial investigation of the site, and perform a feasibility study of various alternatives for remedial action — a process referred to as Remedial Investigation/Feasibility Study (RI/FS) — before

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[2] Expansion of the Superfund is pending in Congress. *See* H. R. 2005, 96th Cong. 1st Sess., 131 Cong. Rec. H 11,547, 11,595 (daily ed. Dec. 17, 1985); 131 Cong. Rec. S 12,184 (daily ed. Sept. 26, 1985).

[3] EPA is required to evaluate the adequacy of clean up proposals submitted by private responsible parties. 40 C.F.R. §300.68(i) (1985).

developing a Remedial Action Plan.[4] EPA procedures contemplate that notice letters to PRPs will be issued by the agency in sufficient time to permit the organization of a steering committee, with the largest possible representation, to participate in the RI/FS process and, ultimately, to reach a satisfactory resolution of the issue with EPA before the Superfund is used.[5] In short, CERCLA is not a regulatory standard setting statute such as the Clean Air Act, 42 U.S.C. §§7401 *et seq.* Rather, the government generally undertakes pollution abatement, and responsible parties pay for such abatement either through their own efforts, or through reimbursement liability.[6]

B. Administrative Proceedings

Petitioners are corporations whose wastes were disposed of at the inactive Lone Pine Landfill, located in Freehold, New Jersey, adjacent to the headwaters of the Manasquan River. No petitioner was ever responsible for the management or operation of Lone Pine and each legally used the site.

Lone Pine was operated from 1959 to 1979 to receive municipal and septic wastes as well as bulk liquids and industrial wastes. EPA has stated that the bulk liquid and drummed hazardous wastes were illegally disposed of in the landfill during 1977 and 1978. (3a.)

EPA and state studies of the landfill conducted from 1981 to 1984 revealed that low level contaminants were being

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[4] A remedial investigation is a study of the nature and extent of contamination at the site. 40 C.F.R. §300.68(f). Following the remedial investigation, the feasibility study evaluates alternatives for remedial action on the basis of: (a) cost; (b) performance; and (c) engineering feasibility. 40 C.F.R. §300.68(h).

[5] CERCLA and the NCP also authorize EPA to undertake removal actions at sites that require emergency response actions. *See* 42 U.S.C. §9604(a) (1); 40 C.F.R. §300.65. CERCLA also authorizes EPA to seek injunctive relief in the event that conditions at a site present an imminent hazard. *See* 42 U.S.C. §9606.

[6] Funds for the Superfund originate from taxes on petroleum products and inorganic chemicals, as well as general federal revenues. 42 U.S.C. §9631.

released from the landfill into the Manasquan River and nearby aquifers from both surface runoff and leaching through the permeable soil under the landfill.[7] Significantly, EPA has never claimed, nor could it, that Lone Pine ever created an emergency, requiring immediate action, or that Lone Pine presents an imminent hazard to the environment. It is uncontroverted that groundwater affected by the landfill is not used for drinking, or for industrial or agricultural purposes. The landfill has no adverse ecological effects on the Manasquan River, and poses no threat to a planned reservoir 16 miles away. Indeed, EPA's "worst case" scenario, hypothesizing a substantial change in the nature of contaminants from Lone Pine, has been completely discredited by recent physical tests revealing that the level of contaminants is now decreasing.[8]

Nevertheless, in October 1981, largely out of concern over discharges from Lone Pine into the river, EPA placed Lone Pine on the Superfund National Priorities List (NPL)[9] and began its RI/FS process to determine the extent of contamination and evaluate alternatives for remedial action at the site. EPA began the RI/FS process without issuing notice

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[7]The contaminant releases observed from the site have consisted of low concentrations of chemical compounds classified as toxic pollutants by EPA. The significant pollutants observed in river and groundwater samples to date have been volatile organic compounds (VOCs), specifically benzene, toluene and ethylbenzene. These chemical constituents are commonly found in municipal, septic, and industrial waste known to have been disposed of at the landfill.

[8]The most recent analyses by EPA consultants show levels of contaminants in the monitoring wells two orders of magnitude lower than the hypothetical levels used in EPA's model to select the remedy for Lone Pine. IT Corp., Transmittal Ground Water Quality Analysis Results (Sept. 23 and Oct. 14, 1985).

Analyses by the Steering Committee supplementing the record in the Third Circuit demonstrate a like disparity. Versar, Inc., An Analysis of Recent Chemical and Geohydrological Data From the Lone Pine Landfill, Freehold, New Jersey (Aug. 1985).

[9]Section 105 of CERCLA required EPA to establish a National Priorities List (NPL) of at least 400 sites from which federal funds could be used, *inter alia*, to investigate the extent of contamination, evaluate methods for remediation and implement remedial actions designed to minimize the release of hazardous substances. 42 U.S.C. §9605.

letters to any PRP. Subsequently, in the spring of 1983, after completion of the remedial investigation, EPA sent notice letters to 15 parties, including the six corporate petitioners, in which it offered each party the opportunity to perform its own individual feasibility study. In response, five companies formed the Lone Pine Steering Committee (the "Steering Committee") to evaluate conditions at Lone Pine and to determine the appropriate remedial action.[10] After forming the Steering Committee, these five companies contacted EPA to determine what progress was being made with EPA's Remedial Investigation/Feasibility Study.[11]

At this stage, EPA effectively prevented the creation of a truly representative steering committee. The agency declined to issue notice letters to additional PRPs, and refused to divulge the name of any party receiving a notice letter to any other party. Petitioners were individually told that they must accept EPA's "sight unseen" remedy in order to be authorized to conduct further RI/FS studies. After lengthy and tedious research, petitioners identified each other, as well as other PRPs that had not yet received EPA notice letters. These parties were reluctant to communicate with petitioners, much less participate in any remedial action funding, absent any indication that EPA considered them to be PRPs. Not surprisingly, none of the 15 companies or individuals receiving a notice letter in 1982 volunteered to conduct the FS portion of the RI/FS alone.

In June 1983, EPA released a draft feasibility study prepared by its private consultant, Camp, Dresser & McKee (CDM). This study reviewed five remedial action alternatives

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[10] The five original members of the Steering Committee were Carter-Wallace, Inc., The Coca-Cola Company, the Minnesota Mining & Manufacturing Company, Owens-Illinois, Inc., and the Millipore Corporation (for Worthington Biochemical Corporation).

[11] Since 1983, the Committee has held frequent meetings with EPA, the New Jersey Department of Environmental Protection (DEP), and other waste generators. The Steering Committee's consultants have conducted extensive studies and have thoroughly reviewed studies by EPA.

ranging from no action to a total excavation of contaminants. EPA indicated its preference for a remedial plan which would involve: (a) placement of a clay cap; (b) construction of an underground wall (slurry wall) around the landfill; and (c) pumping and treatment of contaminated groundwater.

EPA provided the public, including petitioners, only three weeks to submit written comments on the feasibility study. This three-week comment period was totally insufficient for petitioners fully to evaluate the study's five remedial action alternatives, or to propose an additional remedial action alternative at Lone Pine. Nevertheless, based upon new environmental studies of the site and other information, the Steering Committee submitted documents critical of aspects of EPA's recommended remedial action alternative as unnecessary in light of conditions at Lone Pine. Although the Committee supported the use of a clay cap, it disputed the necessity for immediate placement of an underground slurry wall and groundwater pumping scheme, finding that those options would be available if conditions at the site unexpectedly deteriorated.

In the spring of 1984, before the selection of a remedy, EPA contractors sampled the Manasquan River and the results of their analysis verified the results obtained in studies by the petitioners, which showed no effect on the river. EPA directed CDM to prepare a Supplemental Feasibility Study evaluating additional alternatives, including the one suggested by the Committee for a clay cap on the landfill coupled with an extensive monitoring program and additional remedial actions in the event that conditions at the site deteriorated.

In June of 1984, EPA released its Supplemental Feasibility Study. The study evaluated the alternative suggested by the Committee and concluded that capping the landfill and monitoring future discharges was likely to reduce the introduction of contaminants into the river. Nevertheless, the study rejected petitioners' alternative because of the lack of contingency planning for remedial action.

Following release of the Supplemental Feasibility Study, the Steering Committee directed its consultants to develop

a comprehensive remedial plan, meeting CDM's concern for contingency planning.

On September 12, 1984, EPA sent out new CERCLA notice letters to the original 15 recipients of 1982 notice letters, as well as to 127 additional companies alleged to be PRPs at Lone Pine. Nothing in the record explains why EPA delayed so long in notifying these other PRPs. The September 12, 1984, notice letter offered each recipient an opportunity to undertake voluntary remedial action and requested a response by September 26, 1984.

Petitioners submitted a remedial plan to EPA on September 26, 1984. It contained a detailed analysis of existing environmental conditions at Lone Pine and a comprehensive program for remedial action. This plan proposed: (1) the placement of a cap over the landfill to prevent exposure to contaminated materials and to reduce significantly the infiltration of rain which would otherwise carry contaminants through the landfill and into the environment; (2) a thorough program for additional investigation of groundwater conditions at and adjacent to the Lone Pine site to insure that there is no threat to deep aquifiers below the landfill; (3) a 20-year monitoring program with an early warning system, and (4) a contingent remedial action plan. Perhaps most significantly, petitioners' plan could cost as little as $7.5 million, which would be financed totally through private resources, without drawing upon monies in the Superfund.

Two days after receipt of the Steering Committee's plan, on September 28, 1984, despite assurances from EPA that the Committee's concerns would be discussed at a meeting prior to issuance of a decision, EPA issued its final Record of Decision (ROD). The ROD, accompanied by extensive supporting documentation obviously prepared before the Committee's proposal was filed, "selected" the alternative proposed by CDM — a cap, slurry wall and groundwater pumping and treatment system. EPA's ROD constitutes the final agency action on a remedial plan for Lone Pine. The ROD commits the agency to spend approximately $17 million in federal funds to design and construct the remedy selected. Under EPA's ruling, the

total cost of its plan would be financed initially through the Superfund, with EPA relying upon the policy of seeking reimbursement from private parties. EPA's remedial design is still being developed and final design documents will not be available until June or July 1986, with construction now scheduled to begin in 1987. *See* Appendix D, at 40a.

C. Proceedings in the District Court

On October 30, 1984, petitioners filed an action in the United States District Court for the District of New Jersey invoking that court's jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 9613, and seeking both declaratory and injunctive relief against EPA in connection with its final decision for Lone Pine. The complaint alleged that EPA had violated CERCLA, including the NCP, by ignoring the remedial plan developed by the Steering Committee and requiring the expenditure of over $17 million in Superfund and state resources for duplicative and unnecessary corrective measures. The petitioners also alleged that EPA's conduct of the administrative proceedings was arbitrary and capricious, and a violation of the Administrative Procedure Act, 5 U.S.C. § 704, particularly because of its reliance upon inaccurate technical data and extra-record evidence which petitioners had not had the opportunity to rebut. Petitioners also alleged that EPA's failure to afford them a hearing, and an opportunity to contest the reasonableness of its proposed expenditures, was a taking of property in violation of the Due Process Clause of the Fifth Amendment. (18a.)[12]

On November 2, 1984, at a hearing on petitioners' motion for preliminary injunction, EPA represented that there would no immediate construction, and therefore no irretrievable commitment of resources, at Lone Pine, and that the petitioners would be notified of any significant step before it was

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[12] The complaint also alleged a violation of the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, because of the agency's failure to prepare an Environmental Impact Statement, or to permit full public participation in its decision.

undertaken. Accordingly, the petitioners did not pursue their request for injunctive relief, and the case proceeded as one for declaratory relief alone. Thereafter, EPA moved under Fed.R.Civ.P. 12 to dismiss the complaint for lack of jurisdiction. On January 21, 1985, the district court (*per* Debevoise, J.) granted the defendant's motion. (44a.)[13]

In its accompanying opinion, the district court concluded that CERCLA permitted EPA to undertake clean up actions without a prior determination of liability, and that EPA's decision was not subject to judicial review. Although CERCLA explicitly provides the district courts with original jurisdiction "over all controversies" arising under the Act, 42 U.S.C. §9613(b), the district court held that Congress did not contemplate pre-enforcement review of EPA's decisions to undertake remedial actions under Section 104.

Central to the district court's reasoning was its analysis of the language and legislative history of CERCLA. According to the district court, because CERCLA was adopted to enable EPA to respond "immediately" to "highly threatening waste sites" it was implicit that pre-enforcement review would "frustrate" that purpose. (30a-31a.) The court rejected the distinction drawn in the statute between emergency and non-emergency situations, and did not explain how an action for declaratory relief, as opposed to one seeking an injunction, would delay EPA's response, particularly if it proceeded during the period before construction was scheduled to commence. (18a.) Finally, the court concluded that petitioners would have an opportunity to challenge EPA's decision to use the Superfund at Lone Pine when EPA sued for reimbursement, without considering the practical difficulties of requiring petitioners to await the expenditure of public funds before challenging EPA action, or the impact on the Fund if a court actually held that monies were not properly spent. (37a.)

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[13] While the motion was pending, the petitioners offered to install a clay cap at Lone Pine, with the remainder of the project to be completed by EPA. This offer was rejected by the agency.

D. Proceedings in the Court of Appeals

On appeal, a panel of the Third Circuit (*per* Weiss, J) affirmed the district court's judgment. (43a.)[14] The Court of Appeals recognized that EPA had an "obligation to work with the responsible parties in developing appropriate measures" and was "not unaware of bureaucratic excesses." (10a.) The Court of Appeals also declined to accept statements by the district court — that were at odds with the findings of EPA — that Lone Pine threatened the water supply of substantial numbers of people. Nevertheless, it agreed with the district court that CERCLA impliedly precluded pre-enforcement review of EPA's decisions. Relying on cases such as *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), and *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950), both of which involved imminent threats to public health and safety, the court concluded that pre-enforcement review of even non-emergency decisions was "inconsistent" with the statutory scheme of CERCLA (9a). The court also rejected petitioners' argument, without citation of authority, that post-enforcement review was inadequate because the controversy would fundamentally change once Superfund monies were used for a particular site. (10a.)[15]

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[14] There is some confusion in the Court of Appeals opinion on this score. In the first paragraph of the opinion, the Court of Appeals states that it is affirming the district court's dismissal of petitioners' complaint. (3a.) In the last paragraph, the Court of Appeals states that it is affirming the district court's denial of an injunction. (12a.) In fact, the sole issue before the Court of Appeals was the propriety of the district court's decision to grant EPA's motion to dismiss under Fed.R.Civ.P. 12.

[15] The Court of Appeals did establish a number of guidelines to be used by EPA in any subsequent action for reimbursement, including a requirement that petitioners be permitted to "contribute to the record" by "submit[ting] pertinent comments or objections as the work progresses." (10a.)

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Raises Important Issues Concerning the Interpretation of CERCLA That Require Resolution by This Court.

The Court of Appeals concluded that the district courts were deprived of all jurisdiction to review final decisions of EPA to exercise its non-emergency clean up authority under section 104 of CERCLA, until that agency completed remedial action and sought to recover its costs. In the view of the Court of Appeals, no final EPA decision, even one that did not involve an imminent threat to health or to the environment, may be reviewed in the federal courts before the Superfund had been used, at taxpayer's expense. By so concluding, both the Third Circuit, and the other Court of Appeals that has addressed the issue,[16] have now raised serious questions concerning the proper enforcement of one of the largest and most far reaching environmental programs in the Nation's history. For that reason, this Court should grant certiorari to review the decision of the Third Circuit.

The Third Circuit's decision, as well as that of the district court, was based upon its concern over the general need for "prompt action" to clean up highly threatening waste site if CERCLA were interpreted to permit potentially responsible parties to obtain judicial review of the issuance of a ROD. (6a.) This concern is legitimate and any construction of the procedural law applicable to CERCLA by this Court should also meet the public's need for prompt and cost-effective remedial action at the thousands of sites that call for it.

The difficulty with the extreme approach of the Court of Appeals, however, is that it ignores the equally significant Congressional objective, that the finite resources of the Superfund not be depleted unnecessarily, particularly when private plans provide an adequate response to the hazardous waste

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[16] In *J. V. Peters & Co., Inc.* v. *Administrator, EPA*, 767 F.2d 263 (6th Cir. 1985), the Sixth Circuit also held that pre-response judicial review is not available in a case challenging EPA's decision under section 104 of CERCLA.

problem at a particular site. If the Court of Appeals' approach is adopted on a nationwide basis, no challenge to an erroneous EPA decision to use the Superfund could be made until funds had been expended improperly, by which time those public resources would be irretrievably lost. Moreover, because the Third Circuit's view seems to be one that at least one other circuit has also followed.[17] it is important that the issue be resolved now, before the Fund is seriously impaired.

The dangers inherent in the Third Circuit's decision are precisely those which Congress has sought to avoid. Section 104(a) of the Act, 42 U.S.C. §9604(a), explicitly provides that EPA's authority to undertake non-emergency action not be exercised if the agency determines that "such removal and remedial action will be done properly by the owner or operator of the vessel or facility from which the threat of release emanates, or by any other responsible party." By so doing, the Act carefully distinguishes between long-term response actions, and removal actions necessary to abate emergencies or immediate risks to the public. *Compare* 42 U.S.C. §9601(23) *with* 42 U.S.C. §9601(24). *See* 42 U.S.C. §9606 (abatement actions, injunctive relief and fees). *See also New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1040-42 (2d Cir. 1985). As explained by the chief House sponsor of the Act, the limitations upon EPA's discretion in non-emergency situations were enacted to assure that EPA did not "automatically start cleaning things up and suing someone." Rather, "EPA is required not to act if the responsible party or parties will take appropriate action to clean up and contain these sites." 126 Cong. Rec. 26,787 (1980) (Remarks of Rep. Florio). *See* H. R. Rep. 1016, Part 1, 96th Cong., 2d Sess. 13 (1980) *reprinted in* 1980 U.S. Code Cong. & Ad. News 6119.

Had Congress sought to restrict review of decisions made under section 104, it could have done so. Instead, the only provision of CERCLA relating to judicial review provides:

> [T]he United States district courts shall have exclusive original jurisdiction over *all controversies*

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[17] *See J.V. Peters & Co. Inc.* v. *Administrator, EPA*, 767 F.2d 263 (6th Cir. 1985). *See also Wheaton Indus.* v. *United States Environmental Protection Agency*, No. 85-5524, Slip op. (3rd Cir. Jan. 21, 1986).

> *arising under this chapter*, without regard to the citizenship of the parties or the amount in controversy.

42 U.S.C. §9613(b) (emphasis added).

By contrast, where Congress has restricted review of agency decisions it has done so in clear and express terms. *See also Block* v. *Community Nutrition Institute*, 467 U.S. 340 (1984); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).[18]

There can be no serious question concerning the practical impact of the Court of Appeals decision. The Congressional Office of Technology Assessment (OTA) recently estimated that as many as 10,000 sites may need to be addressed and potential "costs to Superfund could easily be $100 billion. . . ." OTA, Superfund Strategy, Summary 8 (Mar. 1985). *See also New York* v. *General Electric Co.*, 592 F. Supp. 291, 302 (N.D.N.Y. 1984) (citing similar statistics from EPA).

EPA itself has recognized:

> that Fund-financed cleanups, administrative action and litigation will not be sufficient to accomplish CERCLA's goals, and that voluntary cleanups are essential to a successful program for cleanup of the nation's hazardous waste sites. EPA Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034, 5035 (Feb. 5, 1985).

Anderson, Negotiation and Informal Agency Action: The Case of Superfund, for the Administration Conference of the United States 77-85 (May 25, 1984).

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[18] *See* 12 U.S.C. §1735b(c) (1982) (decision of Secretary of Treasury "shall be final and conclusive and shall not be subject to judicial review"). *See also* 5 U.S.C. §8347(c) (1982 and Supp. 1984); 22 U.S.C. §16229 (1982); 38 U.S.C. §1827(b) (1982); 40 U.S.C. §723 (1982); 42 U.S.C. §1715 (1982); 42 U.S.C. §3374(f) (1082); 50 U.S.C. §47d(b) (1982).

Moreover, both the Office of Technology Assessment[19] and the Administrative Conference of the United States[20] have raised serious questions concerning the EPA's technical approach and its enforcement policy. If the Court of Appeals' interpretation of CERCLA continues to be accepted in the lower courts, none of these issues can be raised before the (unnecessary) expenditure of millions of dollars of public resources.

The facts of this case well illustrate the need for judicial review of EPA's final decisions under CERCLA before public resources are spent. In considering a remedy for Lone Pine, EPA began the RI/FS process before notifying potentially responsible parties, and then, when notification finally came, the agency effectively impaired the ability of PRPs to organize into a truly representative steering committee. Thereafter, when the Steering Committee submitted its own proposal — which was amply supported by expert engineering data, and which involved the use of no Superfund resources, and was as much as $9.6 million less expensive that the proposal of EPA's own expert — EPA gave the Committee alternative all of two days' "consideration" before issuing its ROD. The EPA decision itself is replete with references to extra-record evidence, and totally ignores expert data contrary to its *a priori* conclusion, particularly that which establishes a source of contaminants of far less magnitude than that assumed by

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[19] "In case studies of Superfund cleanups by OTA and others there is evidence of significant problems in the quality of technical work." Superfund Strategy, Summary at 32. "The quality and timeliness of the remedial investigations and feasibility studies generally have not been adequate. Too often RI/FS projects take too long, present insufficient data, lack key alternatives and do not provide sufficient evaluation or rationale for the alternatives." Wyer, EPA, *Optimizing the Remedial Action Program*, presented at Hazardous Site Control Research Institute Seminar (Nov. 7, 1984).

[20] "The current agency approach to CERCLA emphasizes clean-ups paid for out of the Superfund coupled with actions to recover the expenditures. . . . This strategy has resulted in a CERCLA implementation effort that is slow and expensive." Recommendation 84-4 of the Administrative Conference of the United States, 49 Fed. Reg. 29,947, 29,942 (July 25, 1984).

the agency.[21] In short, EPA has ignored Congress' mandate to consider alternative plans proposed by responsible parties before the finite resources of the Superfund are used. Because of the continuing danger that such arbitrary action will result in needless depletion of the Superfund, this Court should exercise its certiorari jurisdiction in this case.

II. This Court Should End the Disarray Among the Lower Federal Courts Concerning the Rights of Private Parties to Raise Defenses to EPA Actions under CERCLA.

The holding of the Court of Appeals that CERCLA impliedly precludes immediate review of Superfund decisions is premised on its view that PRPs, such as the members of the Steering Committee, will have an adequate opportunity to challenge EPA's decisions as defenses in the inevitable actions for reimbursement under section 107 of the Act, 42 U.S.C. §9607. (10a.) The conclusion of the Court of Appeals, however, stands in sharp contrast to the weight of authority that has developed in the lower courts on this issue, when actions under section 107 have actually been brought. Often accepting arguments by the government, courts ruling on section 107 claims by EPA, have restricted defenses that PRPs may raise in opposition to the agency's demands for reimbursement under section 107. *See, e.g., United States* v. *Wade*, 557 F. Supp. 1326, 1335-36 (E.D. Pa. 1983); *United States* v. *Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100, 1117-18 (D. Minn. 1982). For example, in *United States* v. *Northeastern Pharmaceutical & Chemical Co.*, 579 F. Supp. 823 (W.D. Mo. 1984), the court stated that "[a]s long as the actions taken by the government were in harmony with the [NCP], the costs incurred pursuant to those actions are presumed to be reasonable

[21] The briefing document accompanying the ROD repeatedly refers to "evidence that wastes were buried beneath the water table" to justify the extent of the EPA-selected remedy. *See, e.g.*, EPA, Briefing for the Assistant Administrator, Record of Decision, Lone Pine Landfill, 37 (Sept. 21, 1984). The purported evidence was not part of the ROD or the record made available to the Steering Committee. Petitioners do not believe such credible evidence exists.

and therefore recoverable." *Id.* at 851. In essence, PRPs such as the members of the Steering Committee now find themselves in a "Catch 22" without any effective opportunity to challenge EPA decisions that could expose them to multi-million dollar judgments. Because the disarray in lower court decisions on the scope of section 107 now raises serious constitutional questions under the Due Process Clause of the Fifth Amendment, review by this Court has become particularly important.

Petitioners' underlying legal challenge to EPA's Lone Pine decision is based principally upon petitioners' demonstration that EPA violated sections 104 and 105 of the Act by ignoring the plan proposed by the Steering Committee as well as the requirements of the NCP, to develop a response that is "cost effective." There is nothing in the language of section 107, however, or in the cases that have interpreted it, that would give petitioners optimism concerning their ability even to raise these claims when the government seeks reimbursement of its clean up expenses.

Section 107(a) of the Act, 42 U.S.C. §9607(a) provides:

> Notwithstanding any other provision or rule of law and subject only to the defenses set forth in subsection (b) [responsible parties] shall be liable for . . . all costs of removal or remedial action incurred by the United States Government or a state not inconsistent with the national contingency plan. . . .

This language imposes "strict liability" upon those from whom EPA may seek reimbursement. *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1043-45 (2d Cir. 1985); *United States* v. *Price*, 577 F. Supp. 1103, 1114 (D. N.J. 1983). Moreover, several courts have concluded that Congress did not intend that section 107 incorporate by reference other provisions of the Act, or limit the ability of EPA to recover monies already spent.

For example, in *United States* v. *Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100 (D. Minn. 1982), a private party sought to defend a reimbursement action under section 107

by establishing that the government had failed to comply with section 104 of the Act. The court rejected this argument in unambiguous terms:

> From this language it is apparent that Congress did not intend that courts engage in the complex inquiry and statutory tracing of various sections [defendant] relied on. Section 107(a) was meant to stand by itself; liability under it can be determined without the numerous inquiries suggested by the defendant. The plain language of the statute says so. Liability for the specified response costs under section 107(a) is absolute, subject only to the defenses listed in section 107(b), which are acts of God, acts of war, and certain acts or omissions of third parties. 546 F. Supp. at 1118 (citation omitted).

Indeed, it appears that, in reimbursement actions by the government against private parties, "every court that has addressed this issue has held that the liability provisions of section 107(a) are separate and independent from the requirements of section 104." *New York* v. *General Electric Co.*, 592 F. Supp. 291, 303 (N.D.N.Y. 1984), *citing United States* v. *Northeastern Pharmaceutical & Chemical Co.*, 579 F. Supp. 823 (W.D. Mo. 1984); *United States* v. *Wade*, 577 F. Supp. 1325 (E.D. Pa. 1983); *Ohio ex rel. Brown* v. *Georgeoff*, 562 F. Supp. 1300, 1315 (N.D. Ohio 1983); *United States* v. *Reilly Tar & Chemical Co.*, 546 F. Supp. 1100 (D. Minn. 1982). At the very least, the courts have imposed upon private parties the burden of establishing that particular costs are inconsistent with the plan. *United States* v. *Northeastern Pharmaceutical & Chemical Co.*, 579 F. Supp. at 850-51. *See also New York* v. *Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985) (applylimited interpretation of NCP to find state compliance).

When viewed together, the Third Circuit's denial of direct review of EPA decisions under section 104, combined with earlier decisions by other federal courts refusing to permit those issues to be raised as defenses to claims for reimbursement under section 107, pose fundamental questions under

the due process clause of the Fifth Amendment.[22] Due process requires that those who are faced with deprivation of a property interest — such as liability for $17 million to the United States — are entitled to notice of the government's decision and an opportunity to be heard in opposition "at a meaningful time and in a meaningful manner." *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976). *See Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). Yet, because the federal courts have been unable to evolve a consistent interpretation of CERCLA, EPA now has *carte blanche*, not only to impose upon private parties multimillion dollar liability, but to refuse even to provide those parties an adequate opportunity to raise substantial factual and legal issues as defenses to EPA's actions.

EPA's response in this situation has been effectively to ignore the alternative proposals of private parties. Before ruling on Lone Pine, for example, no administrative fact-finding hearing was conducted, nor was all the evidence EPA relied upon available to the petitioners and the public at the time of the decision. EPA received a detailed technical submission from petitioners in response to a letter requesting their input, yet failed to review or consider the submission before issuing its "Record of Decision."[23] Dozens of companies failed to receive any formal notice of their potential involvement until two weeks before the final agency action — after the agency-imposed close of the comment period. By themselves, these irregularities justify review by this Court.

In sum, because the lower federal courts have now adopted interpretations of sections 104, 105 and 107, that conflict with one another, and effectively deny responsible parties a right to obtain review of EPA's CERCLA decisions, this Court should grant the instant petition, and establish a national precedent on this issue.

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[22] The due process clause of the Fifth Amendment provides that: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

[23] The Court of Appeals also granted the petitioners' motion to supplement the record on appeal with the latest groundwater data from the site, showing actual contaminant levels far below the level used in the EPA model underlying the EPA Record of Decision.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 20, 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5097

LONE PINE STEERING COMMITTEE, CARTER-WALLACE, INC., THE COCA-COLA COMPANY, MILLIPORT CORPORATION, MINNESOTA MINING & MANUFACTURING COMPANY, THE NESTLE COMPANY, INC., AND OWENS-ILLINOIS, INC.,

Appellants

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

. Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. CIVIL NO. 84-4513)

Argued October 1, 1985
Before: WEIS and BECKER, *Circuit Judges*,
and ZIEGLER,* *District Judge*
(Filed November 22, 1985)

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OPINION OF THE COURT

WEIS, *Circuit Judge*.

To prevent harm from a toxic waste dump, the EPA planned construction to contain the contaminants and process ground water. On completion of the work, the EPA intends to bring suit for the costs incurred. Contending that the project was unnecessarily extensive, some of the parties allegedly responsible for the site condition sought an injunction. The district court dismissed the suit on the basis that pre-enforcement judicial review was contrary to statutory intent. We agree and affirm.

Plaintiff Steering Committee is composed of six corporations, which are part of a group of 142 companies alleged by the EPA to be responsible for the costs of remedying conditions at the Lone Pine Land Fill in Freehold, New Jersey. Investigations by the EPA revealed the presence of toxic substances dumped at the 45-acre landfill during its operation from 1959 to 1979. The area was closed in 1979.

The EPA, as well as the New Jersey Department of Environmental Protection, conducted various studies showing that contaminants were moving from the landfill to the Manasquan River. The toxic substances were reaching the river by two different routes, overland by surface runoff and through the permeable soil under the landfill by leaching into to acquifers which discharge into the river.

Although the Manasquan River is not presently being used for drinking water, it is contemplated that in the future an intake will be constructed some 16 miles downstream from Lone Pine.

The parties disagree about the extent of contamination and its effect on the environment. However, it is undisputed that the landfill contains a substantial amount of toxic substances. Seventeen thousand drums containing chemical waste were deposited there along with more than one million gallons of hazardous bulk liquid. Because of the extent of contamination, the EPA ranked the Lone Pine site as number fifteen on

the Superfund National Priority List. *See* 40 C.F.R. 300 (1985); Appendix B.

In 1981 and 1982, New Jersey and the EPA undertook various studies and investigations to determine whether the conditions at Lone Pine posed a threat to public health. On July 6, 1982, the EPA sent letters to fourteen firms informing each that it "may be a responsible party" with respect to the releases of hazardous substances at the landfill. An additional company received similar notice on September 3, 1982. Eventually, the EPA determined that as many as 142 entities might be responsible parties.

In an effort to select "an appropriate response action", each of the 15 companies was asked to "perform a feasibility study" to determine remedial alternatives for Lone Pine. When none of the companies offered to clean up the site, the EPA held a public meeting on September 16, 1982 to discuss its proposed plans and to consider further testing. In the Spring of 1983, five companies formed the Lone Pine Steering Committee to evaluate conditions at the landfill and, if necessary, to develop and implement remedial action. Soon afterwards, the EPA released for comment a three volume "Draft Feasibility Study" of remedial possibilities. The study contained five alternatives, ranging from no action to complete excavation and removal of the contaminants.

Another public meeting was held on June 24, 1983. Counsel for the Steering Committee was present and participated in the discussion. The EPA expressed preference for a proposal which required the placement of a clay cap over the landfill, the construction of an underground slurry wall around the site, and the pumping and treatment of contaminated groundwater lying within the wall.

Several days later, the Committee took exception to the EPA's proposal, contending that the slurry wall and the treatment system were superfluous. The Committee suggested a clay cap and a monitoring program to detect conditions that might make further response necessary. The EPA rejected this proposal as inadequate. Observing that capping will "significantly reduce the net influx of contaminates to the river", the EPA nevertheless concluded that measure alone could not prevent contaminants from seeping into the underground water supply.

The comment period was extended, and another public meeting was scheduled. Five companies submitted comments to the EPA as did local citizens. The EPA met with the Steering Committee and two corporations during the next twelve months and, in June 1984, released a supplemental feasibility study.

A public meeting was held on August 1, 1984, at which time the Steering Committee reoffered its proposal. The EPA again expressed a preference for its original plan, which included the slurry wall, the clay cap, and the treatment system.

On September 12, 1984, the EPA sent notices to approximately 142 companies including the plaintiffs, notifying them of their statutory right to undertake the construction proposed by the agency. If a company was unwilling to pay for all or a part of the cost, the EPA advised that it would use federal funds to clean up the site and would sue for reimbursement. The companies were directed to respond by September 26, 1984. Several did, but none offered to perform any part of the EPA's construction plan.

The Committee resubmitted its plan, stating in a letter that its alternative "could form the basis for a negotiated settlement" which "could be implemented without the expenditure" of public funds. The Committee reiterated its position that financial responsibility "must be shared by all parties who operated, used, or whose wastes were disposed of at Lone Pine." In addition, the letter noted that the remedial plan "should not be viewed as a commitment to undertake this program in the absence of" a negotiated settlement "by all responsible parties (whether or not identified to date by the EPA),"

Two days later, on September 28, 1984, the EPA Assistant Administrator signed a Record of Decision, a 434 page document, adopting the EPA's plan for a slurry wall, a clay cap, and extraction wells. EPA also decided to perform further studies to determine if additional steps were required.

On October 30, 1984, the Committee filed this declaratory judgment action, alleging that the EPA's plan was too costly, the agency had failed to evaluate adequately the Committee's proposal, and the Record of Decision contained inaccurate technical data and erroneous assumptions resulting in duplicative and unnecessary corrective measures. The EPA moved

to dismiss the suit for lack of pre-enforcement jurisdiction.

While the motion was pending, the Committee offered to install the clay cap, with the remainder of the project to be performed by the EPA. The agency rejected that proposal, citing difficulties in coordination and assessment of responsibilities, but offered to meet with the Committee for further discussions.

The district court granted the motion to dismiss, holding that the statutory language and legislative history of the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA) reveal that Congress did not contemplate pre-enforcement judicial review of the EPA's decision to implement response action.[1] "To allow judicial review of an [order] by an entity which may (or may not) be the subject of a subsequent recovery action would frustrate Congress' intent to provide a mechanism whereby hazardous sites can be neutralized expeditiously." 600 F. Supp. at 1494-95.

The court observed that "Congress intended to empower EPA to take prompt action without the delays associated with litigation." The fact that remedial actions may require time for planning and study does not change the picture. "Just because unavoidable delays are required to plan and implement a response does not mean that Congress contemplated the additional delays which judicial review would entail." *Id.* at 1498.

The court concluded that every objection plaintiffs "could legitimately raise in a judicial proceeding at this time" could be asserted in a cost recovery action under § 107 of the Act. Hence, if some of the measures which the EPA proposed were not cost effective, recovery for those items would be denied.[2]

On appeal, plaintiffs contend that they will be prejudiced in a post hoc recovery action because it will be impossible at that time to show that the response action was excessive. If the EPA's remedial action is effective, plaintiffs will not be able to

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[1] The district court's opinion is reported at *Lone Pine Steering Committee* v. *United States, E.P.A.*, 600 F. Supp. 1487 (D.N.J. 1985).

[2] The same considerations which led the court to find a lack of jurisdiction under the Superfund Act also caused it to hold that adoption of the Record of Decision was not appealable under the Administrative Procedure Act, 600 F. Supp. at 1499 n.2.

demonstrate that their less comprehensive proposal would also have been adequate for the task. To that extent, the remedial measures would destroy the evidence which plaintiffs require. Thus they argue that in a practical sense the recovery action does not provide adequate review. Moreover, they assert that denial of pre-enforcement judicial scrutiny is not justified because the EPA has conceded that no emergency action is required at the Lone Pine Landfill.

In response, the EPA urges that Congress intended to preclude pre-cost recovery review of all response actions—removal as well as remedial measures. *See* 42 U.S.C. §9601(25). The agency also asserts that no deprivation of the plaintiffs' property interest can occur before the completion of a cost recovery suit. In that litigation, plaintiff will have the opportunity to raise the issues of cost effectiveness and statutory compliance as defenses.

We begin with the general proposition that parties aggrieved by final agency rulings shall have access to the courts. "[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe such was the purpose of Congress." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967). *See also Block* v. *Community Nutrition Institute*, 467 U.S. 340, 104 S. Ct. 2450 (1984). In some instances, however, particularly when the public health is threatened, an administrative agency is permitted to act first and litigate later.

Hodel v. *Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264 (1981), upheld the government's right under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1201 *et seq.*, to order cessation of a mining operation when it created a danger to public health or threatened significant and imminent environmental damage. The Court found that this provision, which allowed the affected company to contest the government's action after mining, had ceased to satisfy constitutional requirements. "It is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient . . . that there is at some stage an opportunity for a hearing and a judicial determination." *Id.* 452 U.S. at 303, quoting *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950).

The latter case sustained the government's right under the Food, Drug, and Cosmetic Act to seize a misbranded food supplement before a judicial determination was made. *See also Pharmadyne Laboratories, Inc.* v. *Kennedy*, 596 F.2d 568 (3d Cir. 1979) (district court lacked jurisdiction to enjoin the FDA from seizing allegedly adulterated drugs); *Bethlehem Steel Corp.* v. *EPA*, 669 F.2d 903 (3d Cir. 1982) (despite accrual of daily penalties, party challenging non-compliance order must complete administrative proceeding before seeking judicial review).

In property deprivation cases, due process does not require access to the courts before final administrative action. Likewise, a statute, at least in a public health area, may prohibit pre-enforcement judicial review.

CERCLA was enacted in response to concerns about the danger to public health presented by hazardous waste sites and the slow reaction by the EPA to solve the problem. Congress wanted the parties responsible for the hazardous conditions to perform the abatement. However, because cooperation is often difficult or impossible to obtain, Congress empowered the EPA to take clean up action when necessary.

The EPA was directed to compile a list of sites to be designated as the "Top Priority Among Known Response Targets." 42 U.S.C. § 9605(8)(B). After placing a site on the list, the EPA investigates the potential threat to the public posed by the waste materials. On finding that some type of response action is required, the EPA has three alternatives. It may:

> (1) issue an administrative order, enforceable through fines of up to $5,000 per day, directing a responsible party to implement either removal or remedial action, 42 U.S.C. § 9606; or
>
> (2) apply for an injunction in the district court to compel the responsible party to clean up or abate the actual or threatened release, 42 U.S.C. § 9606; or
>
> (3) perform the work itself and sue the responsible party for reimbursement, 42 U.S.C. § § 9604, 9607.

In this case, the EPA chose the last option.

Section 9604(a), (§ 104(a) of the Act), provides that whenever any hazardous substance is released into the environment or there is a substantial threat of such release, the President

(who has delegated the authority to the EPA) may "act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance. . . . unless the President determines that such removal and remedial action will be done properly by the owner . . . or by any other responsible party." *See* 40 C.F.R. § 300 (1985) (The National Contingency Plan).

Section 9607 provides that the responsible party "shall be liable for . . . all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the National Contingency Plan." That provision requires that the remedial action be "cost effective." *See* 42 U.S.C. § 9604(d); *see also* 1980 U.S. Code Cong. & Ad. News 9116, 9132.

CERCLA does not set out differing limitations on removal or remedial activities. Although plaintiffs assert that the remedial action contemplated here could be performed as litigation continues, that may not always be true in other situations. The legal question of when judicial review is available should not depend on the peculiar facts of each case. In addition, if the response work proceeds during the course of litigation, there is a strong possibility that shifting circumstances will make a final determination by a court difficult. Particularly, this might be so when engineering considerations become major factors. The district courts should not be required to become construction supervisors.

It is significant that § 9604 permits the EPA to proceed without an express determination of identifying the responsible parties. Circumstances may arise in which the finding of liability could not be reached until after lengthy judicial proceedings. In the meanwhile, a threat to public health and environment might evolve into actual harm and existing damages might increase. That scenario is present here. The EPA has listed more than 142 companies as possible responsible parties. Some have already denied liability and others, no doubt, will not agree to expend sizeable sums until a court decides the issue. To delay remedial action until the liability situation is unscrambled would be inconsistent with the statutory plan to promptly eliminate the sources of danger to health and environment.

The statutory approach to the problem of hazardous waste

is inconsistent with the delay that would accompany pre-enforcement review. Thus, although not explicitly stated in the statute, we find in § 9604 an implicit disapproval of pre-enforcement judicial review. That policy decision is not limited to emergency situations but applies to remedial actions as well.

Section 9607 provides an adequate opportunity for the alleged responsible parties to object to the cost and adequacy of response actions. Plaintiffs here contend they may be at a disadvantage in contesting the extent of the remedy after the fact, but we do not find that to be a constitutional deficiency. It is a problem shared with defendants in many civil actions where damages are sought. Indeed, we believe that alleged responsible parties under the statute may be in a somewhat better position to mitigate damages than a defendant in the routine civil case.

Under § 9604, the EPA has an obligation to work with the responsible parties in developing appropriate measures. The courts are not unaware of bureaucratic excesses and will undoubtedly look carefully at the claims made by the government when suit for reimbursement is brought under § 9607. We note that the Steering Committee has been consulted by the EPA throughout these proceedings, has secured its own cost estimates of proposed work, and has submitted plans to do some of the project. We assume all of these matters have or will become part of the agency record.

Even if judicial review is limited to the agency record, a matter we explicitly do not decide here, plaintiffs are in a position to contribute to that record. They can observe the remedial project, submit pertinent comments or objections as the work progresses, and prepare for the § 9607 suit. Continued monitoring of the EPA by the alleged responsible parties and the prospect of a § 9607 trial are adequate safeguards to insure that the agency gives serious consideration to objections and comments by the parties. The reimbursement trial will not be a pro forma proceeding but will permit presentation of adequate evidence for careful and exacting study by the court. The statute requires the EPA to observe cost effectiveness, and that mandate is a limitation, not a license to squander. We expect the recovery trial to utilize that approach.

We observe further that the financial impact is felt immediately in § 9106 cases, when the responsible parties are

directed to abate a hazardous condition. However, when action is taken under § 9604, as in this case, there is no actual property deprivation until after the suit for reimbursement. For that reason also, deferral of judicial review to that time is defensible.

The district court also relied on the legislative history particularly the comments in the Senate report emphasizing that "delay will often exacerbate an already serious situation" and that "it is preferable to err on the side of protecting public health, welfare and the environment in administering the response authority of the fund." S. Rep. 848, 96th Cong., 2d Sess., 56 (1980), *reprinted in* A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 at 363. We agree with the district court, and conclude that the legislative history of CERCLA illustrates that Congress intended to preclude pre-cost recovery judicial review.[3]

In holding that pre-response judicial review is not available in a § 9604 case, we are in agreement with the Court of Appeals for the Sixth Circuit. In *J. V. Peters & Co., Inc.* v. *Administrator, E.P.A.*, 767 F.2d 263 (6th Cir. 1985), the court pointed out that Congress is considering legislation to revise CERCLA, including amendments specifically denying jurisdiction to consider pre-enforcement challenges to the EPA response actions. Although the bills in the Senate and House contain similar language, we do not rely on them since they have not been approved by both Houses. We note, nonetheless, that the proposed legislation and its legislative history are instructive on the question of pre-enforcement judicial review. *See* H.R. 2005, 99th Cong., 1st Sess., 131 Cong. Rec. S 12184, 12197 (1985). *Cf. Taylor* v. *United States*, 749 F.2d 171 (3d Cir. 1984) (Even though the President declined to sign a bill into law, we found

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[3] In submitting a report on a bill to amend CERCLA, the Senate Committee on Environment and Public Works stated the district court's opinion in this case correctly determined that pre-enforcement review was barred. Superfund Improvement Act of 1985, Report of the Committee on Environment and Public Works to Accompany S. 51, 99th Cong., 1st Sess., Report No. 99-11, March 18, 1985.

Its language and legislative history persuasive as expression of congressional intent).

Several district courts have also found no jurisdiction for pre-enforcement review. *See, e.g., Wagner Electric Corp.* v. *Thomas*, 612 F. Supp. 736 (D. Kans. 1985); *Aminoil, Inc.* v. *United States, E.P.A.*, 599 F. Supp. 69 (C.D. Cal. 1984).

Plaintiffs rely on *Outboard Marine Corp.* v. *Thomas*, ____ F.2d _____, Slip No. 85-1753 (7th Cir. Sept. 23, 1985), but that case is distinguishable. In *Outboard*, the EPA sought to gain access to the company's property to perform preliminary design work in preparation for the actual remedial construction. The company asked the district court to enjoin the EPA from executing a warrant for entry and investigation. The court denied the company's request. The court of appeals reversed, concluding that § 9604 does not empower the agency to enter private property to conduct investigations in non-emergency situations.

We conclude that the district court properly denied the plaintiffs' request for an injunction to prohibit the EPA from taking remedial action under § 9604. Although we recognize the importance of judicial review of agency action, we are persuaded that the purpose of the statute would be frustrated if review is allowed at this stage. Accordingly, the judgment of the district court will be affirmed.[4]

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[4] Plaintiffs also contend that the EPA has not complied with the National Environmental Protection Act (NEPA). The district court concluded that plaintiffs lack standing because their interest in general environmental concerns was neither pleaded nor demonstrated. Their professed interests were limited to potential financial liability for the remedial action. We find no error in the district court's disposition of the issue. In addition, we have considered the plaintiffs' other contentions and have found them unpersuasive.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5097

LONE PINE STEERING COMMITTEE, CARTER-WALLACE, INC., THE COCA-COLA COMPANY, MILLIPORT CORPORATION, MINNESOTA MINING AND MANUFACTURING COMPANY, THE NESTLE COMPANY, INC., and OWENS-ILLINOIS, INC.,

Appellants

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. CIVIL NO. 84-4513)

Argued October 1, 1985
Before: WEIS and BECKER, *Circuit Judges*,
and ZIEGLER, *District Judge*

Opinion Filed November 22, 1985

ORDER AMENDING OPINION

IT IS ORDERED that the opinion heretofore filed in this matter be amended as follows:

On page 9 of the slip opinion, 6 lines down from the top of the page, remove the comma after the word "mining," place a comma after the word "ceased," delete the word "to," and change the word "satisfy" to "satisfied."

On page 11 of the slip opinion, second full paragraph, in the second line, delete the word "of."

BY THE COURT,

Joseph F. Weis, Jr.
United States Circuit Judge

Date: December 2, 1985

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 84-4513

LONE PINE STEERING COMMITTEE; CARTER-WALLACE, INC.; THE COCA-COLA COMPANY; MILLIPORE CORPORATION; MINNESOTA MINING & MANUFACTURING COMPANY; THE NESTLE COMPANY, INC.; and OWENS-ILLINOIS, INC.,
Plaintiffs,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendant.

OPINION

Original Filed
January 31, 1985
Allyn Z. Lite, Clerk

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DEBEVOISE, District Judge.

I. Nature of the Proceedings

Plaintiffs, Lone Pine Steering Committee and six corporations whose wastes were or may have been disposed of in the Lone Pine Landfill in Freehold, New Jersey ("Lone Pine"), instituted this action against the United States Environmental Protection Agency ("EPA")[1] seeking declaratory and injunctive

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[1] To assist the reader of this opinion I list here the initials, acronyms and shortened names which will be used:

CDM – Camp, Dresser & McKee, Inc.

CERCLA – Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601, *et seq.*

DEP – New Jersey Department of Environmental Protection.

Draft Feasibility Study – Camp, Dresser & McKee, Inc.'s Draft Feasibility Study Evaluation of Potential Action Alternatives issued in June 1983.

EPA – The United States Environmental Protection Agency.

relief relating to the closure of Lone Pine.

Reduced to its bare essentials the complaint alleges that plaintiffs have conducted scientific studies of the Lone Pine site and have developed a remedial plan for the closure of the landfill which meets all of the requirements of the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601, *et seq.* ("CERCLA") and of the National Contingency Plan adopted pursuant to the Act ("NCP"); plaintiffs intend to implement their remedial plan using funds from parties whose wastes are in the landfill; in violation of CERCLA and the NCP, EPA has failed to evaluate plaintiffs' plan and has issued a Record of Decision ("ROD") which obligates the Agency to spend at least $17 million in federal and state funds for the closure of Lone Pine; the ROD is based upon inaccurate and incomplete technical data and contains erroneous assumptions, resulting in duplicative and unnecessary corrective measures for which the limited moneys in the Hazardous Substance Removal Fund ("Removal Fund") will have to be expended in the first instance and for which plaintiffs, among others, may ultimately be liable.

Plaintiffs' remedial plan provides for the placement of a barrier layer or cap over the entire 50 acre site to prevent local exposure to contaminated materials and to reduce significantly the infiltration of rain which would otherwise carry contaminants through the sandy soils in the landfill and into the environment. The plan also provides for additional hydrogeological investigation of groundwater conditions to determine if there is

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Lone Pine – Lone Pine Landfill located in Freehold, New Jersey.

NCP – National Contingency Plan.

NEPA – The National Environmental Policy Act, 42 U.S.C. §§ 4332, *et seq.*

Removal Fund – The Hazardous Substance Removal Fund.

ROD – Record of Decision.

Steering Committee – Lone Pine Steering Committee consisting of the corporate plaintiffs in this case.

any threat to deep aquifers below the landfill. Finally plaintiffs' plan calls for a 20-year monitoring program and, if the monitoring shows deteriorating conditions, contingency action which would be implemented to prevent environmental harm.

EPA's ROD, like plaintiffs' plan, calls for a clay cap over the entire Lone Pine site and for additional hydrogeological study. Unlike plaintiffs' plan, however, the ROD contemplates construction of an underground wall (slurry wall) around the landfill and pumping and treatment of contaminated groundwater. These latter two measures, plaintiffs contend, are completely unnecessary to ensure compliance with applicable laws and regulations, will exhaust the Removal Fund whose limited resources should be spread among as many dangerous sites as possible, and threaten plaintiffs with unwarranted liability if EPA should seek in the future to recover the costs from them.

The complaint advances seven grounds for relief. The substance of these claims are that: (i) EPA's actions constituted a violation of specific provisions of CERCLA (Counts 1, 2 and 4); (ii) EPA's actions are arbitrary, capricious and unsupported by the facts, and since the adoption of the ROD is a final agency action it is reviewable under the Administrative Procedure Act, 5 U.S.C. § 704 (Count 3); (iii) EPA's failure to accord plaintiffs a fair hearing and an opportunity to contest the reasonableness of the expenditures it proposes deprives plaintiffs of property without due process of law in violation of the United States Constitution (Count 5); (iv) EPA has violated the National Environmental Policy Act, 42 U.S.C. § § 4332, *et seq.* ("NEPA") by failing to provide for full public participation in an environmental impact statement or its functional equivalent (Count 6); and (v) plaintiffs are entitled to a declaratory judgment pursuant to 28 U.S.C. § 2201 (Count 7).

Plaintiffs moved for temporary restraints, expedited discovery and a preliminary injunction. At the hearing upon the application for a temporary restraining order EPA advised that, with the exception of the hydrogeological investigation, it did not intend to proceed with its plan in the immediate future and it undertook to advise plaintiffs of any significant step before it was undertaken. The parties agreed to meet to seek agreement upon a single hydrogeological study. Consequently there was no need for a temporary restraining order.

Shortly thereafter EPA moved to dismiss the complaint for lack of jurisdiction. A hearing was held on the questions of (i) the court's jurisdiction and (ii) if there is jurisdiction, the scope of review.

II. Applicable Statutory Provisions

Congress enacted CERCLA in 1980 in response to increasing concern over the severe environmental and public health effects from improper disposal of hazardous wastes and other hazardous substances. The difficulty in responding quickly to environmental pollution problems resulting from spills of hazardous chemicals and abandoned waste sites posed a major problem. While EPA had some authority under other statutes to bring suit to require cleanups, it generally lacked the authority and the funds either to conduct itself or to compel private parties to conduct cleanup actions in response to environmental hazards. *See generally United States* v. *Price*, 577 F. Supp. 1103, 1109 (D.N.J. 1983).

CERCLA was particularly designed to address these problems by giving EPA the authority and the funding to take or require immediate cleanup actions without the need for a prior determination of liability. *See* S. Rep. No. 96-848, 96th Cong., 2d Sess. (1980), 10-12, *reprinted in 1 Comm. on Environmental and Public Works, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, at 317-19 (1983).

Sections 104-107 and 211 of CERCLA are the major elements of the statutory program. Section 104, 42 U.S.C. § 9604, authorizes EPA to take "response actions", (i.e., cleanup a site), whenever there is a release or threatened release of a "hazardous substance". Response actions include a broad variety of investigative, evaluative, and cleanup activities, and may involve either the "removal" of threats posed by hazardous substances, or the implementation of "remedial" measures designed to affect a permanent remedy. Sections 101 (23-25), CERCLA, 42 U.S.C. § § 9601 (23)-(25).

The National Contingency Plan required by Section 105, 42 U.S.C. § 9605 ("NCP) guides these response activities. 40 C.F.R. Part 300. It sets forth methods for discovering and

investigating sites at which hazardous substances have been located, methods for remedying releases of hazardous substances, and criteria for determining the appropriate extent of response activities.

EPA response actions under Section 104 are initially financed through the Hazardous Substance Response Trust Fund (the "Fund") created by Section 221 of CERCLA, 42 U.S.C. §9631.

As an alternative to an EPA cleanup under Section 104, Section 106 of the Act, 42 U.S.C. §9606(a), provides EPA with the authority to compel responsible parties to cleanup or abate actual or threatened releases of hazardous substances posing an "imminent and substantial danger" to health or the environment. Actions for injunctive relief to abate such dangers may be brought by the Attorney General in the federal district court in the district where the site is located. 42 U.S.C. §9606(a). In addition, this section gives EPA the authority to issue such administrative orders as may be necessary to protect public health and welfare and the environment. Necessarily, this includes the authority to issue orders directing one or more responsible parties to undertake removal or remedial actions. *See* CERCLA Section 107(c) (3), 42 U.S.C. §9607(c) (3).

EPA may bring an action in district court to enforce its administrative orders and to seek penalties of $5,000 for each day of "willful" violation. 42 U.S.C. §9606(b). If EPA decides to cleanup the site itself when faced with noncompliance, it may recover its costs under Section 107(a) and may seek punitive damages under Section 107(c) (3) of three times the cleanup costs if the party's failure to comply was "without sufficient cause." 42 U.S.C. §9607(c) (3).

Both the statute and the regulations implementing it require that to the greatest extent feasible the removals and remedial actions be performed by the parties responsible for the hazardous condition and that costs be kept at the minimum amount consistent with the elimination of the hazardous condition.

Section 104(a) (1) of CERCLA, 42 U.S.C. §9604(a) (1), authorizes EPA to take curative action consistent with the NCP "*unless* [EPA] determines that such removal and remedial

action will be done properly by the owner or operator . . . of the facility from which the release or threat of release emanates, or by any other responsible party." (Emphasis added.) Section 105 of CERCLA, 42 U.S.C. §9605 requires that the NCP include "(9) specified roles for private organizations and entities in preparation for response and in responding to release of hazardous substances, including identification of appropriate qualifications and capacity therefor." Implementing these statutory requirements 40 C.F.R. §300.68(c) provides:

> As an alternative or in addition to Fund-financed remedial action, the lead agency may seek, through voluntary agreement or administrative or judicial process, to have those persons responsible for the release clean up in a manner that effectively mitigates and minimizes damage to, and provides adequate protection of, public health, welfare, and the environment. The lead agency shall evaluate the adequacy of clean-up proposals submitted by responsible parties or determine the level of clean-up to be sought through enforcement efforts, by consideration of the factors discussed in paragraphs (e) through (j) of this section. The lead agency will not, however, apply the cost balancing considerations discussed in paragraph (k) of this section to determine the appropriate extent of responsible party clean-up.

Both the statute and the regulations reflect Congressional intent that EPA "may *not* act where the party responsible for the release or threatened release . . . will take proper action." H.R. Rep. No. 1016, Part 1, 96th Cong., 2d Sess. *reprinted in* 1980 U.S. Code Cong. & Ad. News 6119, 6133. (Emphasis added.) When CERCLA was originally enacted, its principal House sponsor, Representative Florio, stated in the floor debate:

> [as to] apprehensions [that] EPA is going around to automatically start cleaning things up and suing someone. This situation is not going to occur because EPA is required not to act if the responsible party or parties will take appropriate action to cleanup and contain these sites.

Cong. Rec. H9467 (daily ed. Sept. 23, 1980). *See* H.R. Rep. No. 96-1016, Part 1, 96th Cong., 2d Sess. (1980); S. Rep. No. 848, 96 Cong., 2d Sess. (1980).

The statute and regulations also contain specific directions to minimize costs. Section 104(c) (4), 42 U.S.C. § 9604(c) (4), provides that:

> The President shall select appropriate remedial actions determined to be necessary to carry out this section which are to the extent practicable in accordance with the national contingency plan and which provide for that cost-effective response which provides a balance between the need for protection of public health and welfare and the environment at the facility under consideration, and the availability of amounts from the Fund established under subchapter II of this chapter to respond to other sites which present or may present a threat to public health or welfare or the environment, taking into consideration the need for immediate action.

Section 105, 42 U.S.C. § 9605, requires that the NCP include:

> (2) methods for evaluating, including analyses of relative cost, and remedying any releases or threats of releases from facilities which pose substantial danger to the public health or the environment;
>
> . . .
>
> (7) means of assuring that remedial action measures are cost-effective over the period of potential exposure to the hazardous substances or contaminated materials.

Implementing these statutory directives, 40 C.F.R. § 300.68(j) provides:

> The appropriate extent of remedy shall be determined by the lead agency's selection of the remedial alternative which the agency determines is cost-effective (i.e. the lowest cost alternative that is technologically feasible and reliable and which effectively mitigates and minimizes damage to and provides

adequate protection of public health, welfare, or the environment).

A principal purpose of the provisions requiring that a responsible party undertake the removal or remedial action if feasible and requiring that such undertakings be accomplished at a minimum cost is to preserve the Removal Fund so as to maximize the number of hazardous sites which will be cleaned up.

When it is necessary for EPA to effect curative action CERCLA contemplates that monies expended from the Fund for cleanup will, where possible, be recovered from "responsible parties" through the liability provisions set out in Section 107, 42 U.S.C. §9607. *See generally State ex rel. Brown* v. *George-off*, 562 F. Supp. 1300, 1308 (N.D. Ohio 1983).

Section 107(a) of CERCLA imposes liability for the costs of response activities upon the persons responsible for the releases of hazardous substances. The United States may recover such costs, if "not inconsistent with the National Contingency Plan," from:

(1) The owner or operator of the site;

(2) any person who owned or operated the site at the time hazardous substances were disposed of at the site;

(3) any person who arranged to have his own wastes taken to the site for disposal or treatment; and

(4) any person who transported wastes for disposal or treatment to a site he selected.

42 U.S.C. §9607(a). Liability under this section is subject to three defenses: an act of God, acts of war, or certain acts or omissions of third parties. Section 107(b), 42 U.S.C. §9607(b).

III. The Basis of Plaintiffs' Claims

Plaintiffs allege that EPA's adoption of the ROD violated various of these statutory and regulatory provisions. To set plaintiffs' contentions in focus, a summary of the events which led to the present litigation would be useful.

Lone Pine is a landfill located in Freehold, New Jersey. For many years it was used legally for the disposal of both

municipal and industrial wastes. There came a time when it was closed for the purpose of receiving industrial waste, but it was still authorized to receive municipal waste and septic sludge. During that time very substantial amounts of chemical waste was dumped at Lone Pine illegally. In 1979 Lone Pine was closed altogether. However, by that time it posed a serious threat to local residents, wells and the proposed use of the Manasquan River as a source of drinking water. Pursuant to Section 105 of CERCLA, 42 U.S.C. §9605, EPA ranked Lone Pine to determine whether it was one of the most serious waste sites in the nation and, therefore, eligible for money made available under CERCLA. Lone Pine has consistently been ranked among the fifty worst sites in the United States.

In 1981 and 1982 EPA, along with the New Jersey Department of Environmental Protection (DEP), pursued various studies and investigations seeking to ascertain the extent of the contamination emanating from the site and to determine the potential threat to public health and the environment.

On July 6, 1982 EPA sent "notice" letters to fourteen companies informing each one that it "may be a responsible party with respect to the releases and threatened releases" of hazardous substances from the Lone Pine site. The fourteen companies included five of the six corporate defendants in this action. On September 3, 1982 a notice letter was sent to plaintiff Coca-Cola Company. EPA requested each company to perform a feasibility study evaluating remedial alternatives for the landfill and other response activities.

No private party committed itself to undertake the work, and EPA proceeded to take steps in anticipation of doing the work itself. It held a public hearing on September 16, 1982 and conducted additional extensive studies.

In the spring of 1983 five of the companies that had received the notice letters formed the Lone Pine Steering Committee ("Steering Committee") to evaluate conditions at Lone Pine and to determine the appropriate remedial action.

In June of 1983 EPA released for public comment a three volume "Draft Feasibility Study Evaluation of Remedial Action Alternatives (the "Draft Feasibility Study") prepared by the Agency's consultant Camp, Dresser & McKee, Inc., ("CDM"). This study reviewed five remedial action alternatives ranging

from no action to a total excavation and removal of contaminants. EPA and CDM representatives participated in a public meeting to discuss the Draft Feasibility Study. The Steering Committee's preference was for a remedial plan involving a clay cap over the landfill, a monitoring program and additional remedial actions in the event that monitoring disclosed that conditions at the site had deteriorated. EPA expressed a preference for a plan which would involve: (a) placement of a clay cap, (b) construction of an underground wall (slurry wall) around the landfill, and (c) pumping and treatment of contaminated ground water.

In response to comments it had received (including comments from five of the six corporate plaintiffs), EPA proceeded to study additional remedial options. This resulted in a Supplemental Feasibility Study prepared by CDM and released on June 27, 1984. It proposed the plan outlined in the Draft Feasibility Study for which EPA had expressed an initial preference. As to the Steering Committee's more limited alternative, the Supplemental Feasibility Study stated:

> Recently conducted simulations have shown that capping the landfill will most likely significantly reduce the net influx of contaminants to the river. Therefore, landfill capping and monitoring cannot be immediately dismissed as a remedical alternative because source strength will be reduced over time following capping.
>
> . . .
>
> Alternative 1, landfill capping and location monitoring, would likely reduce the contaminant source input to the groundwater, but implementation of this alternative is also problematic. The purpose of the monitoring system is to provide early warning relative to the presence of a substance that would potentially cause a hazard and to provide a measure of effectiveness of the remedial scheme that has been implemented. Since these contaminants would have a potential impact on the downstream water supply, contingency plans must be prepared. These would include plans and specifications for a groundwater and leachate treatment system. These design documents

and the appropriate funding mechanism provide a means for rapidly installing a groundwater treatment system. Based upon these concerns, Alternative 1 was eliminated from further consideration.

EPA extended the initial public comment period until August 1984 and held another public meeting on August 1, 1984, at which time the Steering Committee presented its remedial proposal.

Meanwhile, following receipt of the Supplemental Feasibility Study, the Steering Committee directed its consultants to prepare a remedial action plan that would address CDM's concern about the need for a detailed contingency plan to back up a cap and monitoring program. In July and August 1984, the Steering Committee and its consultants also met with local citizens' groups to solicit their comments and input into the preparation of a comprehensive remedial plan.

On September 12, 1984, EPA sent notice letters to approximately 142 companies, including corporate plaintiffs, notifying each company of its statutory right to undertake proper remedial action which EPA proposed be done at Lone Pine *prior to* EPA's (a) use of federal "Superfund" monies for remedial action, and (b) subsequent cost recovery action against it. EPA advised that it proposed to proceed with the alternative recommended by CDM and asked each recipient to advise it of the portions of those corrective measures which the recipient was willing to undertake. EPA requested a response by September 26, 1984;

On September 21, 1984, EPA's Region II Office recommended that the EPA Assistant Administrator make a decision on the remedial program.

On September 26, 1984, the date designated by EPA in its September 12 notice letters, the Steering Committee presented a comprehensive remedial action plan for Lone Pine to EPA, DEP and local citizens. This Plan includes an analysis of the existing environmental conditions and a program for remedial action. Plaintiffs' Plan involves the placement of an impermeable barrier layer or cap over the entire 50 acre site. This cap will prevent local exposure to contaminated materials and will significantly reduce the infiltration of waters through the mound and the resultant leachate from the site.

Plaintiffs' Plan also includes a program for additional hydrogeological investigation of groundwater conditions, to determine whether there is any threat to deep aquifers below the landfill. A twenty-year monitoring program is also proposed. If monitoring shows deteriorating conditions, contingency plans for additional remedial action are set forth. Finally, plaintiffs' Plan includes provisions for public participation and for private funding of additional remedial action.

Of course, instead of offering to perform some or all of the alternative plan EPA had selected as requested in EPA's September 12 letter, the Steering Committee submitted its own alternative plan. Even as to that Plan, the Steering Committee made it abundantly clear that it was not offering to implement it, stating:

> While this letter and the enclosed Action Plan constitutes the response of the members of the Lone Pine Steering Committee to EPA's letter of September 12, 1984, by describing the nature and extent of corrective measures which we *may* be willing to undertake at Lone Pine, we would emphasize that the Steering Committee has consistently taken the position that the financial responsibility for implementing remedial action at Lone Pine *must* be shared by *all* parties who operated, used or whose wastes were disposed of at Lone Pine. Accordingly, the Action Plan is presented as the basis for a comprehensive negotiated settlement by all responsible parties (whether or not identified to date by EPA) and *should not be viewed as a commitment to undertake this program in the absence of such a program.* (Emphasis added.)

On September 28, 1984, two days after plaintiffs' Plan and non-offer to perform it was submitted, EPA's Assistant Administrator signed the Record of Decision. The ROD chose an initial source containment strategy at Lone Pine involving the installation of a clay cap over the landfill, a shallow subsurface cutoff wall known as a slurry wall, and extraction wells inside the wall for hydraulic reasons. EPA also determined that additional investigative studies would be undertaken to delineate the extent of offsite contamination and to assess the need

for further action. Unless responsible parties undertake to complete EPA's plan, which seems unlikely, this plan will be paid for at public expense with the expectation that EPA will later seek reimbursement pursuant to Section 107 of CERCLA, 42 U.S.C. §9607.

Plaintiffs charge that "EPA totally ignored Plaintiffs' Plan. Only two days after receipt of the Plan, with no opportunity to accord the Plan even cursory review, EPA issued its ROD 'selecting' the alternative proposed by CDM — a cap, slurry wall and groundwater pumping and treatment system." (Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction at p. 8). Of course, the Steering Committee had expressed to EPA its preference for and its reasons for advocating its more limited concept during the course of its comments upon the June 1983 Draft Feasibility Study, in response to the June 27, 1984 Supplemental Feasibility Study and on various other occasions. A more detailed study of the record will be required to determine how much of substance was added by the September 26, 1984 submission.

Out of this series of events arise plaintiffs' attacks on EPA's adoption of the ROD and decision to proceed with the plan described therein. Specifically plaintiffs contend:

First: EPA, by rejecting out of hand the Lone Pine Committee's Plan submitted on September 26, 1984, has violated Section 104(a) of CERCLA, 42 U.S.C. §9604 which permits EPA to proceed with its own plan only if it finds that remedial action will not be done properly by a responsible party. In its Supplemental Feasibility Study CDM rejected the Steering Committee's approach because contingency plans had not been prepared. Thereafter the Steering Committee prepared contingency plans and submitted them as part of its September 26 Plan. Since EPA did not even consider plaintiffs' Plan, so plaintiffs' argument goes, there was not and could not have been any factual bases for its determination that the Plan (with its contingency plans) was inadequate.

Second: Plaintiffs' plan contains the same elements as the ROD. However, the slurry wall and the pumping and treatment of groundwater is phased over time, dependent upon whether monitoring data suggest changes in contamination constituents which would require these further remedial steps. Failure to

follow plaintiffs' Plan is a violation of Section 105, 42 U.S.C. §9605 and of the NCP which require that EPA select the remedial alternative which is cost effective, i.e., "the lowest cost alternative that is technologically feasible and reliable and which effectively mitigates and minimizes damage to and provides adequate protection of public health, welfare or the environment." 40 C.F.R. §300.68(j).

Third: Plaintiffs assert that EPA's action has foreclosed them from participating in the Lone Pine cleanup, thus threatening them with economic loss when EPA seeks to recover its costs in a post-cleanup proceeding and threatening them with injury to their reputations. Having been denied a pre-remedial response action hearing, plaintiffs claim to have been deprived of their rights without due process of law.

Fourth: NEPA directs the federal government "to the fullest extent possible" to prepare a "detailed environmental impact statement for all 'major Federal actions significantly affecting the quality of the human environment.'" 42 U.S.C. §4332. Since EPA has failed to file an environmental impact statement, to follow NEPA procedures or to provide "the functional equivalent" of an environmental impact statement it is, according to plaintiffs, in violation of NEPA.

Fifth: Plaintiffs charge, finally, that EPA's actions violate the Administrative Procedure Act in that (i) EPA has acted outside the scope of its statutory authority; (ii) EPA has acted arbitrarily and capriciously and otherwise not in accordance with law; and (iii) EPA has failed to comply with procedural requirements mandated by CERCLA, such as making the determination whether private remedial action will be done properly so as to obviate the need for an agency response.

IV. Jurisdiction of the Court

The initial question in this case is whether the court has jurisdiction to address the issues plaintiffs advance. I conclude that the court does not have jurisdiction and that EPA's motion to dismiss should be granted.

It is true that Section 113(b) of CERCLA, 42 U.S.C. §9613(b), provides that "the United States district courts shall have exclusive original jurisdiction over all controversies arising

under this Chapter. . . ." That, however, is only a starting point. It does not mean that every action of EPA taken in the course of administering CERCLA is reviewable by means of a district court action. As in the case of every regulatory statute, "[w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objective, its legislative history, and the nature of the administrative action involved." *Block* v. *Community Nutrition Institute*, 104 S. Ct. 2450, 2454 (1984).

Both the legislative history and the language of CERCLA suggest that to allow judicial review of a ROD by an entity which may (or may not) be the subject of a subsequent recovery action would frustrate Congress' intent to provide a mechanism whereby hazardous sites can be neutralized expeditiously.

Congress enacted CERCLA in 1980 in response to increasing concern over inactive or abandoned sites that contain hazardous wastes or other hazardous substances. Earlier legislation had not effectively dealt with inactive sites. In addition, earlier statutes as well did not permit EPA to respond quickly to problems at a site. While EPA had authority under other environmental statutes to bring legal actions to force cleanup, it lacked clear authority and funds to respond immediately to serious public health hazards from such sites and releases before the legal determinations of liability were made. CERCLA was designed to address this problem by establishing the authority and funding to take immediate response actions, without the need to await a judicial determination of liability (and likewise, before any final administrative determination of liability). *J.V. Peters & Company, Inc.* v. *Ruckelshaus*, 584 F. Supp. 1005, 1011 (N.D. Ohio 1984).

The legislative history underscores that Congress intended to empower EPA to take prompt action without the delays associated with litigation. For example, in discussing Section 104 of CERCLA, 42 U.S.C. §9604, the Senate Committee wrote:

> The paramount purpose of this Section is the protection of the public health, welfare and the environment. It is recognized that government response will often be necessary prior to receipt of evidence which

> conclusively establishes the substances or materials released or the origin of their release, discharge or disposal. Because *delay will often exacerbate an already serious situation*, the bill authorizes the President to respond when a substantial threat of release may exist. This standard is intended to be a flexible one and holds that *it is preferable to err on the side of protecting public health, welfare and the environment in administering the response authority of the fund.*

S. Rep. 96-848, 96th Cong., 2d Sess. 56 (1980), *reprinted in* A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, at 363. (Emphasis added.)

The language used in the Act itself demands a speedy response in cleaning up dangerous sites. For example, the Act authorizes responses if there is a "substantial threat of release," thereby recognizing that speed of response outweighs certainty of damage under the Act. Section 104(a) (1), 42 U.S.C. §9604(a) (1). The Hazardous Substance Response Trust Fund ("Fund") was established to enable response activities to begin expeditiously, rather than having to await the outcome of litigation.

To follow the course which plaintiffs suggest and to allow judicial review of the ROD at this juncture would totally frustrate one of the major objects of CERCLA — prompt action to clean up highly threatening waste sites. Plaintiffs urge that review should be de novo. That, of course, would require a lengthy trial in this court with the possibility of an appeal. Even a judicial review of the EPA action simply on the record before the agency would entail extensive activity in this court and again the possibility, or even likelihood, of a time consuming appeal. Meanwhile with every passing rainstorm and each day while melting snow percolates through the Lone Pine Landfill deadly chemical wastes would be carried towards the water supplies of substantial numbers of people.

In their papers seeking injunctive relief and in their arguments before the court, plaintiffs have presented a distorted version of the true state of affairs. They suggest that on September 12, 1984 EPA for the first time notified potentially

responsible parties of their right to undertake remedial action at Lone Pine; that on September 26, 1984 the Steering Committee, in response to that letter, submitted a detailed plan for effective remedial action and offered to assume complete financial responsibility for putting it into effect; and that on September 28, 1984, without even considering the Steering Committee plan, EPA issued its ROD which adopted the CDM alternative discussed above and committed EPA to undertake the remedial action at public expense.

What in fact happened was that since July 1982 EPA had been discussing with the corporate plaintiffs and others the best way to deal with the Lone Pine menace. At that time, if not long before, plaintiffs knew perfectly well that unless they assumed responsibility for effective remedial measures it was likely EPA would act. During the ensuing months through August 1984 a number of alternatives were discussed, including both the general concept incorporated in the Steering Committee plan and the concept proposed by CDM and adopted in the ROD. EPA's September 12, 1984 letter was not designed to put the Steering Committee on notice that it had an opportunity to prepare a remedial plan. Such notice had been given in the July 6, 1982 letters to five of the corporate plaintiffs and in the September 3, 1982 letter to the Coca-Cola Company. The September 12 letter was designed to inform potentially responsible parties that EPA had concluded that the CDM alternative was the best approach and to give the responsible parties an opportunity to perform all or a portion of the work required to implement that alternative.

The Steering Committee's September 26, 1984 letter was not responsive to the September 12 EPA letter. It did not commit the Committee or any of its members to perform all or any part of the CDM alternative. Instead it transmitted to EPA a beefed up version of the Committee's proposal. Significantly, the papers which plaintiffs presented to the court included the very attractive and impressive plan which accompanied the letter but did not include the covering letter itself. Though plaintiffs now wish the court to believe that they offered to complete at their own expense the capping and hydrogeological study portion of the work which was common to both plans, that was not at all the case. The September 26 letter,

which EPA made available to the court, is a masterpiece of studied avoidance of commitment. It referred to the Steering Committee proposal as a plan the Steering Committee "*may*" be willing to undertake. It noted that financial responsibility "*must*" be shared by all parties who operated Lone Pine or whose wastes were disposed of there. The plan was presented as "the basis for a comprehensive negotiated settlement by all responsible parties (whether or not identified to date by EPA)". To make sure there was no mistake, the letter emphasized that it "should not be viewed as a commitment to undertake this program in the absence of such a [negotiated settlement]."

In the face of that letter plaintiffs seek to persuade the court that on September 26, 1984 they sincerely offered to implement at their expense the proposal to cap Lone Pine and conduct hydrogeological studies. I am confident that this letter was a continuation of the Steering Committee's good faith effort to formulate and ultimately implement an effective plan to deal with Lone Pine. I am sure it was not calculated to cause endless delay in effecting remedial action. However, had EPA been foolish enough to have acted upon the letter, long delay would have been the inevitable effect. EPA has identified 140 potentially responsible parties. There may be many more. Plaintiffs proposed to enter into negotiations with all of them to devise the best way to deal with Lone Pine and to allocate financial responsibility among them all. Plaintiffs, according to their letter, were unwilling to act until *all* of these known and unknown entities had agreed to share financial responsibility. Meanwhile, as the negotiating process ground forward, the poisons of Lone Pine would have been leaching through the soil towards and perhaps into vital New Jersey water supplies.

When EPA failed to accept plaintiffs' program and method of securing its acceptance, plaintiffs instituted this lawsuit seeking injunctive relief. I dwell on the scenario which plaintiffs' September 26 letter would have produced had EPA pursued it, because it is suggestive of the bog into which courts would descend if CERCLA were interpreted to permit potentially responsible parties to obtain judicial review of the issuance of a ROD. Returning to the legal analysis:

Generally, the courts which have confronted the issue have

held that a potentially responsible party may not obtain judicial review of EPA's adoption of a ROD and that such a party must raise his objections in a future cost recovery suit. This was the holding in *United States* v. *Outboard Marine Corp.*, No. 78 C 1004 (N.D. Ill. Aug. 30, 1984) in which the court permitted the government to take a voluntary dismissal of its action to compel a cleanup in order that it could proceed with its own cleanup under CERCLA, anticipating recovery against the defendants in a subsequent cost recovery action. The court rejected defendants' attack on the validity of the ROD, stating that, "[t]he statutory scheme does not provide for any judicial review until such time as the United States sues to recover its cleanup costs."

In *Aminoil* v. *United States Environmental Protection Agency*, Nos. 84-5853 and 84-5863 (D. Calif. Sept. 28, 1984), plaintiffs sought to enjoin implementation of a EPA order issued under Section 106(a) of CERCLA requiring allegedly responsible parties to submit a response plan. The court ruled "that the structure of the statute, its legislative history and cases construing it . . . demonstrate that Congress did not intend to allow judicial review of such orders prior to commencement of either an enforcement action under § 106(B), 42 U.S.C. § 9606(b), or a recovery action under § 107(c) (3), 42 U.S.C. § 9607(c) (3)." To the same effect is the decision in *Earthline Company* v. *KinBuck, Inc.*, Civ. No. 83-4226 (D.N.J. July 23, 1984) in which the court dismissed for lack of jurisdiction an action seeking to enjoin EPA's implementation of an order which EPA issued under 42 U.S.C. § 9606(a).

J.V. Peters & Co., Inc. v. *Ruckelshaus*, 584 F. Supp. 1005 (N.D. Ohio, E.D. 1984), considered a number of issues which are pertinent to the present case. There EPA proposed to pursue a response action pursuant to Section 104(a) of CERCLA, 42 U.S.C. § 9604(a). Plaintiffs, the former owners and operators of the waste facility involved, sued to enjoin implementation of the response action on the ground that EPA had not complied with the applicable provisions of CERCLA and the NCP. Upon defendants' motion to dismiss the court held: (i) The likelihood that EPA would ultimately institute a cost recovery action against plaintiffs gave them standing to sue; (ii) A federal

court's exercise of jurisdiction over a waste facility owner's claim that EPA has failed to comply with these procedures would not contradict the purpose of CERCLA and thus plaintiffs are within the zone of interests to be protected by CERCLA; (iii) In view of the potential for liability which EPA's response action has upon plaintiffs, its decision to conduct the action constitutes final administrative action that is subject to review; (iv) Since the only way plaintiffs can avoid potential liability is to challenge the response action before it is conducted, the issues presented are ripe for review; (v) Since CERCLA contemplates that EPA will move promptly to meet substantial and imminent dangers, if owners and operators were permitted to maintain a suit in federal court whenever EPA was preparing a response action, the purpose of CERCLA would be severely undermined. Therefore, such suits can only be allowed when a claim of no rational basis or failure to follow mandated procedures is specifically alleged and supported by material facts, not merely conclusory statements; (vi) Since plaintiffs' complaint states merely conclusions, it fails to state a cognizable claim; (vii) Since plaintiffs will have an opportunity to assert their defenses in the subsequent cost recovery action and since CERCLA was enacted to permit EPA to respond swiftly to environmental emergencies, CERCLA does not violate plaintiffs' due process rights.

As discussed above, I do not agree with conclusion (ii) above that the exercise of federal court jurisdiction in such a case would not conflict with the purpose of CERCLA. I think the court in *Peters*, when arriving at several of its other conclusions, gave inadequate significance to the cost recovery action provisions of the statute. I will refer to these provisions at greater length below. In any event I do not agree with the court's conclusion that a potentially responsible party may obtain judicial review of EPA's adoption of a ROD.

Plaintiffs urge that the appealability of an EPA action turns upon the nature of the action, i.e., whether it is designed to meet an imminent emergency or whether, like the issuance of a ROD, it is taken after careful planning to meet a long-term problem. The latter kinds of actions, according to plaintiffs, must be appealable even if the former are not. They distinguish the cases I cited above on this basis.

In support of their contentions plaintiffs note that CERCLA distinguishes on its face between "removal" and "remedial" actions. The statute classifies immediate response activities including emergencies as "removal" actions, 42 U.S.C. §§9601(23) and (24). The Act labels planned long-term construction projects, such as those contemplated by the instant ROD, as "remedial actions". Under CERCLA, "remedial actions" include "those actions consistent with permanent remedy taken instead of or in addition to removal actions. . . ." 42 U.S.C. §9601(24). The Act defines "confinement, perimeter protection using dikes, trenches, or ditches, clay cover . . . [and] collection of leachate and runoff" as "remedial actions", not "removal actions".

Remedial actions, by their very nature, will require delays for planning, consultation, public hearings mandated by statute and regulations, and the like. Plaintiffs point to legislative comments which take account of the differences between removal and remedial actions. For example, a Senate Report notes

> "Removal" refers to actions which must proceed without delay upon discovery of a release, discharge or disposal or threat thereof. In contrast, remedy or remedial action refers to potentially more costly, long-lasting response which may include the construction of major facilities and which must often be preceded by considerable study, investigation, planning and engineering before the appropriate actions can be determined.

S. Rep. No. 848, 96th Cong., 2d Sess. 54 (1980). While discussing the National Priority List, required by Section 105 of CERCLA, the Senate Committee noted that the list was "primarily informational":

> [I]nclusion of a facility or site on the list does not itself reflect a judgment of the activities of its owner or operator, it does not require these persons to undertake any action, nor does it assign liability to any person. Subsequent government action in the form of *remedial action* or enforcement action will be necessary in order to do so, and *these actions will be attended by all appropriate procedural safeguards.*

Id. at 60. (Emphasis added.)

Plaintiffs argue that since remedial actions already are subject to time consuming requirements the imposition of the additional delays occasioned by judicial review will not impede the purpose of CERCLA. I cannot agree. CERCLA contemplates that remedial action will be taken as promptly as circumstances permit. It should be obvious that every day's delay in dealing with a hazardous waste site entails risks. Just because unavoidable delays are required to plan and implement a response does not mean that Congress contemplated the additional delays which judicial review would entail.

This conclusion is fortified by the fact that in the circumstances of this case the statute provides an opportunity for responsible parties to contest EPA's actions before they are obligated to pay anything. Section 107(a) of CERCLA provides the time and the place where EPA can seek reimbursement and where an allegedly responsible party can resist the claim. Plaintiffs urge that their rights under Section 107(a) are inadequate. That being the case, they argue, Section 107(a) cannot have been intended by Congress to be a substitute for judicial review of a ROD, and, if it were, it would violate plaintiffs' due process rights.

I see no reason why plaintiffs cannot raise as a defense in a cost recovery action every objection to the ROD which they could legitimately raise in a judicial proceeding at this time. Assuming that plaintiffs are corporations who may be sued under Section 107(a) and assuming that EPA elects to sue them, recovery may only be for "costs of removal or remedial action incurred by [EPA] . . . *not inconsistent with the national contingency plan.*" Section 107(a) (4) (A). The NCP must include, among other things, methods for analyzing relative cost and means of assuring that remedial measures are cost effective, i.e., the lowest cost alternative that is technologically feasible and reliable and which effectively mitigates and minimizes damage to and provides adequate protection of public health, welfare, or the environment. 42 U.S.C. § 9605; 40 C.F.R. § 300.68(j). Thus if the ROD requirement that the Lone Pine response include an underground wall around the landfill and pumping and treatment of contaminated water was not cost effective, it would not be consistent with the NCP and the costs of those portions of the response would not be

recoverable by EPA in a Section 107(a) proceeding. Similarly, if plaintiffs have been prejudiced by any procedural irregularities in the adoption of the ROD, I see no reason why these irregularities could not be raised in a cost recovery action to the extent that they caused damage to the plaintiffs. In the light of EPA's arguments at the hearings in this case, EPA would be hard put to prevent plaintiffs from raising these issues in a Section 107(a) proceeding.

Nothing in *United States* v. *Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo., S.D. 1984) suggests a different conclusion. The court there held that in an action under Section 107(a) (4) (A) (as distinguished from an action under Section 107(a) (4) (B)) "the burden of proving inconsistency with the national contingency plan was that of defendants." 579 F. Supp. at 850. Wherever the burden of proof may lie, the defendant in a Section 107(a) proceeding has a full opportunity to present its case.

Further, plaintiffs contend that limiting judicial review to Section 107 actions for cost recovery would deprive the public of any opportunity to challenge EPA decisions. Plaintiffs pose the situation where an EPA response action is patently inadequate, exposing to serious danger persons who live or work in the vicinity of the hazardous wastes. Were there no judicial review of a ROD, plaintiffs assert, such persons would have no remedy — not even a review in a post hac proceeding.

One answer to this argument is that the statute may contemplate a different rule of judicial review in the case of a victim of a hazardous waste site. The statute is designed particularly to protect such persons, and, unlike the persons responsible for the hazardous waste, no specific provision is contained in the statute under which they can obtain judicial review. An analysis of the statute might lead to the conclusion that Congress did intend that the victims have the right to a judicial review of a ROD. In any event, it is unnecessary to resolve that question now. Whatever the answer, it does not affect my conclusion that the statute does not contemplate that entities such as plaintiffs can obtain judicial review of a ROD.

Having reached this conclusion it is unnecessary to discuss separately the questions of ripeness and standing.[2]

For the reasons set forth above EPA's motion to dismiss the complaint will be granted. I have signed the order of dismissal which EPA's attorneys submitted with their motion.

DATED: January 21, 1985

DICKINSON R. DEBEVOISE
U.S.D.J.

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[2]Plaintiffs also assert that the ROD is reviewable under the Administrative Procedure Act, 5 U.S.C. §704. The considerations which lead me to conclude that CERCLA does not contemplate judicial review of a ROD also lead me to conclude that adoption of a ROD is not final agency action subject to review under the Administrative Procedure Act. *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980). Further, plaintiffs assert that EPA's actions violate NEPA because EPA has failed to file an environmental impact statement, to follow NEPA procedures or to provide the functional equivalent of an environmental impact statement. 42 U.S.C. §4332. Plaintiffs' interests in this case (perfectly legitimate interests) are in their possible financial liability for the cost of EPA's remedial action at Lone Pine. Their interest in general environmental concerns has been neither pleaded nor demonstrated. Therefore, they lack standing under the "zone of interests" test, and their NEPA claim should be dismissed. *Sierra Club* v. *Morton*, 405 U.S. 727 (1972).

APPENDIX D

RECORD OF DECISION
Remedial Alternative Selection

Site:

Lone Pine Landfill site, Freehold Township, New Jersey.

Documents Reviewed:

I am basing my decision primarily on the following documents describing the analysis of the cost-effectiveness of remedial alternatives at the Lone Pine Landfill site:

- Geophysical Investigation for Buried Drums at the Lone Pine Landfill, Technos, Inc., August 1981.
- Lone Pine Landfill Final Report Excavation and Sampling Fred C. Hart, January 1982.
- Lone Pine Landfill Hydrogeological Investigation, Fred C. Hart, July 1982.
- Lone Pine Landfill Analytical Results for Samples Collected, September 1982, Camp Dresser and McKee, February 1983.
- Draft Feasibility Study – Lone Pine Landfill, Camp Dresser and McKee, June 1983.
- Draft Environmental Information Document for Remedial Actions at the Lone Pine Landfill, Camp Dresser and McKee, June 1983.
- Summary of Organic Chemical Concentrations in Water and Sediment Samples, Camp Dresser and McKee, August 1983.
- Evaluation of Analytical Chemical Data from Lone Pine Landfill, NUS Corporation, February 1984.
- Presentation of Analytical Chemical Data and Groundwater Evaluations from Lone Pine Landfill, NUS Corporation, March and May 1984.

- Supplemental Feasibility Study for the Lone Pine Landfill Site, Camp Dresser and McKee, May 1984.
- Lone Pine Landfill Air Investigation Report, Camp Dresser and McKee, September 1984.
- Responsiveness Summary, including documents prepared and presented by the Generators Steering Committee, Freehold Township, Howell Township, and Monmouth County (see Attachment 5).
- Staff summaries, memoranda, letters, and recommendadations.
- Summary of Remedial Action Alternative Selection – Lone Pine Landfill.

Description of Selected Remedy:

- Installation of a shallow groundwater cut-off wall and surface seal over the 45-acre landfill.
- Installation of groundwater collection wells located within the contained zone.
- Treatment of the groundwater collected from within the groundwater cut-off wall and discharge to the Manasquan or Metedeconk River, or alternately, to a sanitary sewer interceptor for treatment at the Ocean County wastewater treatment plant. (The specific treatment scheme will be designated upon completion of the ongoing treatability studies.)

Declarations:

Consistent with the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), and the National Contingency Plan (40 CFR Part 300), I have determined that the selected containment and treatment strategy for the Lone Pine Landfill site is a cost-effective remedy, and that it effectively mitigates and minimizes existing and

potential damage to, and provides adequate protection of public health, welfare and the environment.

I have also determined that the action being taken is appropriate when balanced against the availability of Trust Fund monies for use at other sites.

The action will require future operation and maintenance activities to ensure the continued effectiveness of the remedy. These activities will be considered part of the approved action and eligible for Trust Fund monies for a period of one year.

EPA will undertake an additional field investigation to further delineate the extent of off-site groundwater contamination. If additional remedial action is determined to be necessary to address off-site contamination, a supplemental Record of Decision, will be prepared for approval of the additional action. Also, a treatability study has been initiated to study groundwater treatment methods. The results of this treatability study will be incorporated into the design phase of the remedial project.

The Region has consulted with the State of New Jersey in selecting the recommended remedial action for this site. The State concurs that containment is the most appropriate source control measure for the Lone Pine Landfill.

_____
Date

/s/
Lee M. Thomas
Assistant Administrator
Office of Solid Waste and
Emergency Response

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5097

LONE PINE STEERING COMMITTEE, CARTER-WALLACE, INC., THE COCA-COLA COMPANY, MILLIPORT CORPORATION, MINNESOTA MINING AND MANUFACTURING COMPANY, THE NESTLE COMPANY, INC., and OWENS-ILLINOIS, INC.,

Appellants

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Appellee

(D.C. Civil No. 84-4513)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE ———— DISTRICT OF NEW JERSEY

Present: WEIS and BECKER, *Circuit Judges*, and ZIEGLER, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ———— District of New Jersey and was argued by counsel October 1, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered January 22, 1985, be, and the same is hereby affirmed. Costs taxed against the appellants.

ATTEST:

/s/ Sally Inwos
Clerk

November 22, 1985

*Hon. Donald E. Ziegler, United States District Judge for the Western District of Pennsylvania, sitting by designation.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LONE PINE STEERING COMMITTEE; CARTER-WALLACE, INC.; THE COCA-COLA COMPANY; MILLIPORE CORPORATION; MINNESOTA MINING & MANUFACTURING COMPANY; THE NESTLE COMPANY, INC.; and OWENS-ILLINOIS, INC., *Plaintiffs*,	)	Hon. Dickinson R. Debevoise
	)	Civil Action No. 84-4513
v.	)	**ORDER**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Defendant.*	)	

THIS MATTER having been opened to the Court by the United States Environmental Protection Agency (Samuel P. Moulthrop, Assistant United States Attorney appearing) and the Court having considered the briefs and arguments presented; and the reasons set forth in an opinion of even date,

IT IS on the 21st day of January, 1985

ORDERED that the complaint in the above-captioned matter is hereby dismissed.

DICKINSON R. DEBEVOISE
UNITED STATES DISTRICT JUDGE

APPENDIX G

42 U.S.C. § 9604 provides:

§ 9604. Response authorities

(a) Removal and other remedial action by President; applicability of national contingency plan; definition

(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment, unless the President determines that such removal and remedial action will be done properly by the owner or operator of the vessel or facility from which the release or threat of release emanates, or by any other responsible party.

(2) For the purposes of this section, "pollutant or contaminant" shall include, but not be limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring. The term does not include petroleum, including crude oil and any fraction thereof which is not otherwise specifically listed or designated as hazardous substances under section 9601(14)(A) through (F) of this title, nor does it include natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas).

(b) Investigations, monitoring, etc., by President

Whenever the President is authorized to act pursuant to subsection (a) of this section, or whenever the President has reason to believe that a release has occurred or is about to occur, or that illness, disease, or complaints thereof may be attributable to exposure to a hazardous substance, pollutant, or contaminant and that a release may have occurred or be occurring, he may undertake such investigations, monitoring, surveys, testing, and other information gathering as he may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment. In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.

42 U.S.C. § 9605 provides:

§ 9605. National contingency plan; preparation, contents, etc.

Within one hundred and eighty days after December 11, 1980, the President shall, after notice and opportunity for public comments, revise and republish the national contingency plan for the removal of oil and hazardous substances, originally prepared and published pursuant to section 1321 of Title 33, to reflect and effectuate the responsibilities and powers created by this chapter, in addition to those matters specified in section 1321(c)(2) of Title 33. Such revision shall include a section of the plan to be known as the national hazardous substance response plan which shall establish procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants, which shall include at a minimum:

(1) methods for discovering and investigating facilities at which hazardous substances have been disposed of or otherwise come to be located;

(2) methods for evaluating, including analyses of relative cost, and remedying any releases or threats of releases from facilities which pose substantial danger to the public health or the environment;

(3) methods and criteria for determining the appropriate extent of removal, remedy, and other measures authorized by this chapter;

(4) appropriate roles and responsibilities for the Federal, State, and local governments and for interstate and nongovernmental entities in effectuating the plan;

(5) provision for identification, procurement, maintenance, and storage of response equipment and supplies;

(6) a method for and assignment of responsibility for reporting the existence of such facilities which may be located on federally owned or controlled properties and any releases of hazardous substances from such facilities;

(7) means of assuring that remedial action measures are cost-effective over the period of potential exposure to the hazardous substances or contaminated materials;

(8)(A) criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action. Criteria and priorities under this paragraph shall be based upon relative risk or danger to public health or welfare or the environment, in the judgment of the President, taking into account to the extent possible the population at risk, the hazard potential of the hazardous substances at such facilities, the potential for contamination of drinking water supplies, the potential for direct human contact, the potential for destruction of sensitive ecosystems, State preparedness to assume State costs and responsibilities, and other appropriate factors;

(B) based upon the criteria set forth in subparagraph (A) of this paragraph, the President shall list as part of the plan national priorities among the known releases or threatened releases throughout the United States and shall revise the list no less often than annually. Within one year after December 11, 1980, and annually thereafter, each

State shall establish and submit for consideration by the President priorities for remedial action among known releases and potential releases in that State based upon the criteria set forth in subparagraph (A) of this paragraph. In assembling or revising the national list, the President shall consider any priorities established by the States. To the extent practicable, at least four hundred of the highest priority facilities shall be designated individually and shall be referred to as the "top priority among known response targets", and, to the extent practicable, shall include among the one hundred highest priority facilities at least one such facility from each State which shall be the facility designated by the State as presenting the greatest danger to public health or welfare or the environment among the known facilities in such State. Other priority facilities or incidents may be listed singly or grouped for response priority purposes; and

(9) specified roles for private organizations and entities in preparation for response and in responding to releases of hazardous substances, including identification of appropriate qualifications and capacity therefor.

The plan shall specify procedures techniques, materials, equipment, and methods to be employed in identifying, removing, or remedying releases of hazardous substances comparable to those required under section 1321(c)(2) (F) and (G) and (j)(1) of Title 33. Following publication of the revised national contingency plan, the response to and actions to minimize damage from hazardous substances releases shall, to the greatest extent possible, be in accordance with the provisions of the plan. The President may, from time to time, revise and republish the national contingency plan.

42 U.S.C. § 9607 provides:

§ 9607. Liability

(a) Covered persons; scope

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

42 U.S.C. § 9613 provides:

§ 9613. Civil proceedings

(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia

Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Jurisdiction; venue

Except as provided in subsection (a) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without

regard to the citizenship of the parties or the amount in controversy. Venue shall be in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

APPENDIX H

Counsel has been informed that the subsidiaries and affiliates of Petitioner Minnesota Mining and Manufacturing are as follows:

3M U.S. Subsidiary (not wholly-owned)

Eastern Heights State Bank, a Minnesota corporation

3M Foreign Subsidiaries (not wholly-owned)

3M Korea Limited	Korea
Sumitomo 3M	Japan
3M Indonesia	Indonesia
Minnesota Nigeria Ltd.	Nigeria

3M U.S. Affiliates

Vista, Inc., a Delaware corporation

Cocklear Implant Services of Minnesota, Inc., a Delaware corporation

Harris/3M, a Delaware corporation

(2)

No. 85-1389

Supreme Court, U.S.
FILED
APR 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

LONE PINE STEERING COMMITTEE, ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. (& Supp. I) 9601 *et seq.*, authorizes potentially responsible parties to delay the Environmental Protection Agency's clean-up of hazardous waste sites by litigating their liability prior to or during an agency-conducted clean-up, or whether potentially responsible parties must instead await EPA's initiation of an enforcement action, such as cost-recovery litigation under 42 U.S.C. (& Supp. I) 9607, to raise their challenges to the agency's clean-up actions.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1389

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-14a) is reported at 777 F.2d 882. The opinion of the district court (Pet. App. 15a-39a) is reported at 600 F. Supp. 1487.

JURISDICTION

The judgment of the court of appeals (Pet. App. 43a) was entered on November 22, 1985. The petition for a writ of certiorari was filed on February 20, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, five corporations that organized themselves into the Lone Pine Steering Committee (Steering Committee), filed this action for declaratory and injunctive relief, seeking to block the Environmental Protection Agency's

implementation of a proposed remedial plan to clean up the Lone Pine landfill in Freehold, New Jersey. EPA moved to dismiss petitioners' complaint on the ground that pre-enforcement review of the agency's hazardous waste clean-up actions is not authorized by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. (& Supp. I) 9601 *et seq.*[1] The district court agreed with EPA, and the court of appeals affirmed.

1. Congress enacted CERCLA in 1980 in response to increasing concern over the serious environmental and public health effects stemming from improper disposal of hazardous and toxic substances. Under pre-existing statutes, EPA had some authority to bring suit to require clean-ups, but the agency lacked the authority either to conduct clean-ups itself or to compel private parties to conduct clean-ups without litigation. See *United States* v. *Price*, 577 F. Supp. 1103, 1109 (D.N.J. 1983). CERCLA was designed to address the deficiencies in these earlier statutes by ensuring that clean-up actions would precede litigation. See S. Rep. 96-848, 96th Cong., 2d Sess. 10-12 (1980).

CERCLA authorizes EPA to effectuate clean-ups in several ways. Section 221(a) of the Act, 42 U.S.C. 9631(a), set up a Fund (the Superfund) through which EPA can finance government-conducted clean-ups. Section 104 of

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[1]By the term "pre-enforcement review," we mean any judicial review prior to the time EPA files suit to recover response costs under 42 U.S.C. (& Supp. I) 9607, or to enforce an administrative order under 42 U.S.C. 9606, or to recover civil penalties or damages under 42 U.S.C. 9606 or 42 U.S.C. (& Supp. I) 9607. In the instant case, enforcement will most likely occur when EPA files suit to recover response costs under 42 U.S.C. (& Supp. I) 9607. Thus, the parties and the courts below focused their attention on the availability (or lack thereof) of judicial review before EPA's initiation of cost-recovery litigation.

the statute, 42 U.S.C. 9604, permits the agency to conduct "response actions" (*i.e.*, clean up a site) in the case of releases or threatened releases of hazardous substances. Response actions include a variety of investigative, evaluative, and clean-up activities, and they may involve either short-term "removal" actions or longer-term "remedial" actions designed to effect a permanent remedy. See 42 U.S.C. 9601(23), (24) and (25). Section 104(a)(1) of CERCLA, which describes the various response actions available to EPA, draws no distinction between the agency's authority to take removal and remedial actions.

Guiding EPA's response actions is the revised National Contingency Plan (NCP), 40 C.F.R. Pt. 300, required by Section 105 of CERCLA, 42 U.S.C. 9605. The NCP sets forth methods for discovering and investigating sites at which hazardous substances have been located, methods for remedying releases of hazardous substances, and criteria for determining the appropriate extent of response activities.

Agency clean-ups are funded initially through the Superfund, but EPA may file suit against responsible parties to recover clean-up costs not inconsistent with the NCP. Section 107 of CERCLA, 42 U.S.C. (& Supp. I) 9607. Thus, response actions under Section 104 of CERCLA, 42 U.S.C. 9604, are to precede litigation. The legislative history underscores Congress's intent to empower EPA to take prompt action without the delays inherent in pre-response litigation. In discussing EPA's ability to undertake response actions, the Senate Committee stressed the fact that clean-up delays worsen already serious situations and declared that, if any errors were to be made, the agency should (S. Rep. 96-848, *supra,* at 56)

err on the side of protecting public health, welfare and the environment in administering the response authority of the Fund.[2]

2. The instant case concerns EPA's efforts to clean up the Lone Pine landfill, located in Freehold, New Jersey. The landfill, ranked 19th on the National Priorities List, a list of the most serious hazardous waste sites, 40 C.F.R. Pt. 300, App. B, has consistently ranked among the 50 worst sites in the country. The landfill began operations in 1959 and, after a June 1978 chemical fire, was closed to further waste disposal in 1979. At least 17,000 drums containing chemical wastes and several million gallons of bulk liquid hazardous wastes were dumped at the landfill.[3]

In 1981 and 1982, EPA and the New Jersey Department of Environmental Protection (NJDEP) conducted various studies to determine the extent of contamination at the landfill. These studies confirmed the contamination by hazardous substances of both the surficial Vincentown aquifer and the deeper Red Bank aquifer. Hazardous substances located at the site include benzene, chlorobenzene, methyl chloride, toluene, and vinyl chloride. These

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[2]As an alternative to EPA-conducted clean-ups under Section 104, Section 106 of CERCLA, 42 U.S.C. 9606, authorizes the agency to issue administrative orders compelling private parties to conduct clean-ups whenever releases or threatened releases of hazardous substances create an "imminent and substantial endangerment" to health or the environment. This Section also permits the Attorney General to bring injunctive actions to abate such dangers. *Ibid.*

[3]Testimony, depositions, and other evidence in two separate cases confirmed the disposal of these vast quantities of hazardous substances. *United States* v. *Case,* No. 82-2000 (D. N.J. May 25, 1983), aff'd, No. 83-546 (3d Cir. Apr. 16, 1984), cert. denied, No. 83-6952 (Nov. 26, 1984); *New Jersey Dep't of Environmental Protection* v. *Lone Pine Corp.,* No. C-956-79 (N.J. Super. Ct. filed Oct. 25, 1979).

compounds, found in substantially high levels at the landfill, are toxic and carcinogenic.[4]

EPA sent notice letters to several companies, including petitioners, in July and September 1982, informing them that they might be potentially responsible parties and inviting them voluntarily to conduct a feasibility study that would evaluate remedial alternatives for the landfill.[5] No company came forward to undertake the required work.

EPA therefore conducted the feasibility study itself, releasing a three-volume draft study in June 1983. The study reviewed several remedial alternatives, ranging from no action to total excavation of the landfill. A public meeting was held to discuss the draft study on June 24, 1983. At the meeting, EPA expressed a preference for a plan that included a clay cap over the landfill, construction of an underground slurry wall to contain the contamination, and pumping and treatment of contaminated groundwater. The Steering Committee, represented by counsel at the meeting, presented a proposal in a June 29, 1983 letter to EPA. The

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[4]Petitioners assert (Pet. 4, 5) that only low levels of contamination were found at the landfill. In fact, EPA's Record of Decision is replete with references to the "severe" and "significantly high" levels of contamination. See, *e.g.*, C.A. App. 1196-1197, 1213, 1216, 1232-1233.

[5]The formal EPA policy referred to by petitioners (Pet. 3-4) was not in effect in 1982, when the first round of notice letters was sent. Depositions taken earlier in 1982 in *New Jersey Dep't of Environmental Protection* v. *Lone Pine Corp.*, No. C-956-79 (N.J. Super. Ct. filed Oct. 25, 1979), had identified several of the 15 companies that received the first notice letters from EPA. The Steering Committee had access to the depositions, which were public records. In addition, EPA repeatedly requested from the Steering Committee any information concerning other potentially responsible parties, asking for such information in June, October, and December 1983. C.A. App. 212, 215, 989. The Steering Committee never responded to EPA's repeated requests and was unwilling to tell the agency the identities of the Committee members. C.A. App. 69.

Committee's proposal called for a clay cap and monitoring at the landfill to detect conditions that might make further response actions necessary.[6]

After considering comments on the draft feasibility study, including comments from petitioners, EPA released a supplemental feasibility study in June 1984. This study reaffirmed the three-part plan initially proposed by EPA. The supplemental study noted that, although capping would reduce contamination somewhat, it would not prevent further contamination. EPA held an additional public meeting on August 1, 1984, at which the Committee essentially reoffered its own remedial plan. This plan, the substance of which had been conveyed to EPA earlier (see note 6, *supra*), called for a clay cap and a monitoring program with additional response to occur if conditions at the landfill deteriorated further.[7]

In September 1984, EPA sent notice letters to approximately 142 companies, including petitioners, that it had by then identified as potentially responsible parties. EPA

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[6]Thus, despite petitioners' contentions (Pet. 8, 15), the Committee's plan was first proposed to EPA in June 1983, not in September 1984. It is simply not true that EPA gave the Committee's plan "all of two days' 'consideration' " (Pet. 15) before issuing its Record of Decision. Indeed, the district court commented on the Committee's "distorted version of the true state of affairs" (Pet. App. 31a). The court noted that "[w]hat in fact happened was that since July 1982 EPA had been discussing with the corporate plaintiffs and others the best way to deal with the Lone Pine menace" (*id.* at 32a). The court of appeals also recognized that the Committee had presented its plan to EPA in June 1983 (*id.* at 4a).

[7]In addition to the public meetings during 1982, 1983, and 1984, EPA met with the Committee on five occasions and with officials of the corporate petitioners on three other dates. C.A. App. 1049, 1401-1407. Throughout 1983 and 1984, EPA and its consultants were available for meetings and discussions with the Committee and its members. Furthermore, EPA and its consultants opened their files and provided technical data for review by petitioners. C.A. App. 206-218. EPA flew its consultants to New York for a meeting with petitioners and responded in writing to petitioners' concerns. C.A. App. 1012-1050.

invited the companies to undertake voluntarily the remedial clean-up proposed by EPA, in lieu of a Superfund-financed agency clean-up. The notice letters requested the companies to respond to the agency's request for voluntary clean-up by September 26, 1984.

No company volunteered to undertake any part of the clean-up. Instead, the Committee's September 26, 1984 response offered only what the district court termed "a beefed up version of the Committee's [earlier] proposal" (Pet. App. 32a). The cover letter accompanying the Committee's response made it clear that the Committee was not even firmly offering to undertake its own proposed limited measures.[8]

On September 28, 1984, EPA's Assistant Administrator signed the agency's 434-page Record of Decision (ROD).[9]

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[8]As the district court noted (Pet. App. 32a), the Committee did not present its cover letter to the district court along with its plan. Rather, EPA brought the Committee's "non-offer" cover letter to the district court's attention. That letter, which the district court termed "a masterpiece of studied avoidance of commitment" (*id.* at 33a), stated (*id.* at 27a (emphasis added by district court)):

> While this letter and the enclosed Action Plan constitutes the response of the members of the Lone Pine Steering Committee to EPA's letter of September 12, 1984, by describing the nature and extent of corrective measures which we *may* be willing to undertake at Lone Pine, we would emphasize that the Steering Committee has consistently taken the position that the financial responsibility for implementing remedial action at Lone Pine *must* be shared by *all* parties who operated, used or whose wastes were disposed of at Lone Pine. Accordingly, the Action Plan is presented as the basis for a comprehensive negotiated settlement by all responsible parties (whether or not identified to date by EPA) and *should not be viewed as a commitment to undertake this program in the absence of such a* [negotiated settlement].

[9]Petitioners' inclusion in the appendix to the petition (Pet. App. 40a-42a) of only the first three pages of the ROD conveys the erroneous impression that the ROD was in fact a three-page document. Actually, the ROD comprised 434 pages. Moreover, the ROD itself constituted

The ROD confirmed the presence of significantly high levels of contamination in the aquifers and groundwater.[10] The remedial plan described in the ROD included a clay cap, underground slurry wall, and pumping and treatment of the contaminated groundwater. This plan, unlike that proposed by the Committee, totally controls the source of contamination.

3. In October 1984, petitioners filed this suit in the United States District Court for the District of New Jersey, seeking to block implementation of EPA's remedial plan. The district court dismissed petitioners' complaint, ruling that CERCLA does not authorize pre-enforcement review of EPA's remedial clean-up actions, and the court of appeals affirmed. Both courts reviewed the language of the statute, its objectives, its legislative history, and the nature of the challenged agency action. Both concluded that the pre-enforcement judicial review sought by petitioners would frustrate the central purpose of CERCLA—prompt clean-ups first, liability litigation later. Both courts also concluded that petitioners could raise their objections to the

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only a portion of the documents EPA relied upon in determining the appropriate remedial response. The entire administrative record in this case is over 4,200 pages.

[10]Groundwater samples indicated concentrations of volatile organic compounds far in excess of the levels established by NJDEP for closure of drinking water wells and far beyond exposure levels based on unit cancer risk (UCR) values set by EPA for drinking water. The groundwater concentration of benzene was 2,881 times the UCR level, the concentration of 1,2-Dichloroethane was 1,749 times the UCR level, and the concentration of 1,1-Dichloroethane was 2,908 times the UCR level. C.A. App. 1232. In addition, considerable quantities of leachate are oozing from the landfill into the nearby Manasquan River. And, despite petitioners' unsupported assertion to the contrary (Pet. 5), EPA was concerned about the effect of the contamination on the drinking water reservoir planned for a site 16 miles downstream of the landfill. C.A. App. 1233.

remedial plan selected by EPA in any subsequent cost-recovery action that the agency may bring under Section 107 of CERCLA.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners first argue (Pet. 13-16) that CERCLA permits pre-enforcement review. But this Court has recently ruled that the presumption favoring judicial review "is just that—a presumption." *Block* v. *Community Nutrition Institute,* 467 U.S. 340, 349 (1984). Thus, the availability of judicial review is determined not only by the express language of the statute, but also by the structure of the statutory scheme, its objectives and legislative history, and the nature of the administrative action involved. *Community Nutrition Institute,* 467 U.S. at 345. See also *FTC* v. *Standard Oil Co.,* 449 U.S. 232 (1980).

CERCLA expressly provides for judicial review at the cost-recovery stage under Section 107, 42 U.S.C. (& Supp. I) 9607, when EPA sues for abatement under Section 106(a), 42 U.S.C. 9606(a), or when the agency seeks to recover penalties under Section 106(b), 42 U.S.C. 9606(b). If Congress had intended judicial review to precede clean-up, it would have so provided.[11] Instead, the entire structure

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[11]Section 113(b) of CERCLA, 42 U.S.C. 9613(b), relied upon by petitioners (Pet. 13-14), does give district courts jurisdiction over controversies arising under CERCLA. But that provision cannot be read to create a cause of action for pre-enforcement review when such a cause of action would frustrate the statutory scheme established by Congress.

We note that Congress is currently considering legislation to amend CERCLA. Under the Senate bill, S. 51, 99th Cong., 1st Sess. (1985), no pre-enforcement review would be permitted. The House bill, H.R. 2817, 99th Cong., 1st Sess. (1985), would permit judicial review in certain circumstances, none of which would apply in this case.

of CERCLA supports the conclusion that the determination of liability is to come after clean-up. Indeed, the necessity under pre-existing law to determine liability before clean-up was a major factor hampering effective response actions. CERCLA was enacted to remedy exactly this situation. As previously noted (see pages 2-4, *supra*), the legislative history also supports this reading of CERCLA. Congress expressly recognized that "delay will often exacerbate an already serious situation * * *." S. Rep. 96-848, *supra,* at 56.

Moreover, the nature of the administrative action here calls for prompt clean-up without the delay entailed by pre-enforcement judicial review.[12] Contrary to petitioners' apparent position, Congress drew no distinction between "removal" and "remedial" actions for purposes of judicial review. Both types of actions are described in Section 104, 42 U.S.C. 9604, and both are labeled "response" actions.[13]

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[12]Petitioners maintain (Pet. 10), as they did below, that pre-enforcement judicial review would not hamper the clean-up in this case. Petitioners assert that the clay cap can be constructed while a court rules on the other aspects of EPA's plan. Yet, under the remedial plan adopted by EPA, construction of the clay cap will not be the first step undertaken. Moreover, as the court of appeals observed, "[a]lthough [petitioners] assert that the remedial action contemplated here could be performed as litigation continues, that may not always be true in other situations. The legal question of when judicial review is available should not depend on the peculiar facts of each case" (Pet. App. 9a).

In addition, and contrary to petitioners' assertions (Pet. 10-11), the issue of injunctive relief was before both the district court (see Pet. App. 16a-17a) and the court of appeals (*id.* at 12a). Petitioners contend (Pet. 9-10) that they dropped their claim for injunctive relief while the case was pending before the district court. What petitioners dropped was their request for a temporary restraining order. Not only did they continue to seek injunctive relief before the district court, they moved in that court (although not in the court of appeals) for a stay pending appeal. Thus, the court of appeals was not at all "confused" (see Pet. 11 n.14) about the relief sought by petitioners.

[13]Petitioners equate removal actions with "emergency" actions and refer to remedial actions as "non-emergencies" (Pet. 12-13). This

Judicial review of both is discussed only in Section 106(a) (abatement actions); Section 106(b) (actions for penalties); Section 107 (cost-recovery actions); and Section 107(c)(3) (treble damages proceedings). Congress intended EPA to act as promptly as possible in both removal and remedial actions. See *Eagle-Picher Industries, Inc.* v. *EPA*, 759 F.2d 922, 935 (D.C. Cir. 1985) (court recognized need for quick action even in remedial situations, stating: "[W]e simply observe the obvious—the fact that a situation does not constitute an emergency by no means suggests that rapid response is not desirable.").

In sum, the Third Circuit correctly analyzed the statutory scheme when it concluded that CERCLA does not permit pre-enforcement judicial review. The court of appeals' opinion is consistent with a unanimous line of decisions from other courts holding that CERCLA precludes pre-enforcement review, and petitioners have failed to present any plausible arguments in support of a contrary result.[14] See *Wheaton Industries* v. *United States Environmental Protection Agency*, 781 F.2d 354 (3d Cir. 1986); *J.V. Peters & Co.* v. *Administrator, EPA*, 767 F.2d 263 (6th Cir. 1985); *Wagner Seed Co.* v. *Daggett*, No. 86-CV-97 (E.D.N.Y. Jan. 27, 1986), appeal pending, No. 86-6032 (2d Cir.); *Solid State Circuits, Inc.* v. *EPA*, 23 Env't Rep. Cas. (BNA) 1758 (W.D. Mo. 1985); *Wagner Electric Corp.* v. *Thomas*, 612

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distinction is nowhere to be found in the statute. In light of the possible effects of unchecked toxic waste disposal, delay must be avoided regardless of whether the appropriate response is a removal action, which can be carried out quickly, or a remedial action, which is designed to effect a long-term remedy.

[14]Petitioners cast themselves as the guardians of the Superfund established by Section 221 of CERCLA, 42 U.S.C. 9631 (Pet. 12-14). If petitioners were truly concerned about depletion of the Fund, they could easily have responded affirmatively to EPA's invitation voluntarily to conduct the feasibility study in 1982 or voluntarily to undertake the clean-up in 1984. In fact, however, the Committee did not even offer to undertake its own limited clean-up plan (see page 7 & note 8, *supra*).

F. Supp. 736 (D. Kan. 1985); *United States* v. *United Nuclear Corp.*, 610 F. Supp. 527 (D.N.M. 1985); *United States* v. *Outboard Marine Corp.*, 104 F.R.D. 405 (N.D. Ill. 1984), appeal pending, No. 85-1584 (7th Cir.); *United States* v. *Reilly Tar & Chemical Corp.*, 606 F. Supp. 412 (D. Minn. 1985); *Aminoil, Inc.* v. *EPA*, 599 F. Supp. 69 (C.D. Cal. 1984); *Earthline Co.* v. *Kin-Buc, Inc.*, 21 Env't Rep. Cas. (BNA) 2161 (D.N.J. 1984).[15]

2. Petitioners also ask (Pet. 16-19) the Court to decide what defenses a party may assert in a Section 107 cost-recovery action. Consideration of that issue, should it ever be required, should be undertaken only in the context of an actual cost-recovery case. No such action has been filed against petitioners, and petitioners' attempt to raise the matter now is simply a request for an advisory opinion. Nevertheless, we briefly address petitioners' argument.

There is no "disarray" (Pet. 17) among the lower federal courts concerning the arguments that defendants may raise in a cost-recovery action. The courts are in agreement that Section 107 of CERCLA imposes strict liability on responsible parties and limits permissible defenses to those specified in Section 107(b), 42 U.S.C. 9607(b) (acts of God, acts of war, or acts or omissions of certain third parties). See, *e.g.*, *New York* v. *Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *United States* v. *Wade*, 577 F. Supp. 1326, 1335-1336 (E.D. Pa. 1983); *United States* v. *Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100, 1117-1118 (D. Minn. 1982). This much petitioners do not dispute (see Pet. 12). Nevertheless, petitioners argue that Section 107(a)(4)(A) of CERCLA, 42 U.S.C. 9607(a)(4)(A), which establishes a necessary predicate for liability in any cost-recovery action

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[15]In addition to the Seventh Circuit's expected consideration of the issue in *Outboard Marine*, No. 85-1584, the issue is also pending before the Ninth Circuit in *Time Oil* v. *Barnes*, Nos. 86-3506 and 86-7-40.

initiated by EPA, does not mean what it says. That subsection provides that a responsible party is liable only for (emphasis added)

> all costs of removal or remedial action incurred by the United States Government or a State *not inconsistent with the national contingency plan.*

In any subsequent cost-recovery action, therefore, petitioners may offer proof that the costs claimed by EPA for the Lone Pine clean-up are inconsistent with the National Contingency Plan. Courts have permitted defendants in cost-recovery actions to offer proof that costs were incurred inconsistently with the NCP. See *Shore Realty,* 759 F.2d at 1041, 1043; *United States* v. *Northeastern Pharmaceutical & Chemical Co.,* 579 F. Supp. 823, 850-851 (W.D. Mo. 1984), appeal pending, No. 84-1837 (8th Cir.). Rather than foreclosing consideration of the consistency issue, these courts have simply rejected on the merits defendants' arguments of inconsistency. See also *Ohio ex rel. Brown* v. *Georgeoff,* 562 F. Supp. 1300, 1314 (N.D. Ohio 1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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